

# COMMENTS

## A “LAST HUG” BEFORE EXECUTION: THE CASE IN FAVOR OF CONTACT VISITATION FOR DEATH ROW INMATES IN TEXAS

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\* First and foremost, I want to thank God for granting me peace in my life. I would also like to thank members of *The Scholar* editorial board for being so dedicated to a cause that is still not popular with many influential and intellectual leaders. They have given me this wonderful opportunity to express my ideas in a forum that has been amazingly positive. In addition, I would like to thank the original *Scholar* board for their revolutionary vision of what an alternative law review could be. This comment could not have been written without the guidance of Professor Jeff Pokorak, Father Bill Meyer, Ron Coulter and countless other defense attorneys and abolitionists from across the country that not only have helped me, but are dedicating their entire lives to the honorable cause of attaining justice for those who have been alienated from society. I would also like to thank everyone else who has been supportive of me during the past year, in particular my brother and best friend Scott, and my girlfriend Patricia. With people like you in my life, saving the world seems like an attainable goal. I can not say enough about my parents, Jeffery and Catherine Byrd. I thank them most of all for instilling in me what I believe are the two most important values that a person can possess—the spiritual capacity to forgive people that hurt you and the importance of displaying unconditional love toward the special people in your life. I owe all that I am, and all that I will ever become to the both of them. I want to continue to encourage everyone in the world today that is working for positive change. Today, progressive thoughts and ideas are not mainstream, but fortunately life is more than a popularity contest. No amount of naïveté or criticism can quiet people who are dedicated to being voices for the voiceless. This comment is dedicated to Ireland, Rena, Maria, Napoleon, Jamal, and all the other families coping with a loved one on death row.

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Currently, racial minorities make up over sixty-three percent of the death row population in Texas.<sup>1</sup>

## I. INTRODUCTION

Due to the discriminatory nature of capital punishment in this country, rules and regulations which negatively affect death row inmates, their families, and their attorneys will always disproportionately impact racial minorities and the indigent population.<sup>2</sup> Napoleon Beazley, an African-American, is one such minority currently on death row in Texas.<sup>3</sup> Napoleon lived at the maximum security Ellis facility in Huntsville, Texas for

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1. See Texas Department of Criminal Justice, *Racial Breakdown of Death Row Offenders* (visited Feb. 18, 2000) <<http://www.tdcj.state.tx.us/stat/racial.htm>> (providing statistics showing that Hispanics and African Americans comprise 63.4% of Texas' death row population).

2. Capital punishment opponents have long argued that minorities have a greater chance of landing on death row than white defendants. See Kevin M. Doyle, *A Catholic Lawyer's View of the Death Penalty*, 29 ST. MARY'S L.J. 949, 953 (1998) (arguing that on every death row in this country minorities are grossly overrepresented in comparison to general population patterns). The most exhaustive study of race and capital sentencing ever conducted was the Baldus study during the 1970s. See generally David Baldus, et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983). After controlling for thirty-nine variables which were not racially related in over 2,000 capital murder cases, Baldus, Woodworth, and Pulkaski unearthed the fact that capital defendants found guilty of slaying white victims were 4.3 times as likely to be sentenced to death than those guilty of murdering blacks. See *McCleskey v. Kemp*, 481 U.S. 279, 287 (1987) (using the Baldus study as the primary proof for racial discrimination in capital punishment).

3. Napoleon Beazley was placed on death row for killing a white victim. See Texas Department of Criminal Justice, *Offender Information Napoleon Beazley* (visited Feb. 18, 2000) <<http://www.tdcj.state.tx.us/statistics/deathrow/drowlist/beazley.jpg>> [hereinafter *Offender Information Napoleon Beazley*].

six years.<sup>4</sup> On March 2, 2000 he was transferred to the Terrell Unit in Livingston, Texas, the new prison for males on death row.<sup>5</sup> The first time Napoleon had an encounter with the law was when he was arrested as a murder suspect.<sup>6</sup> Later, Napoleon was charged with capital murder at the juvenile age of seventeen.<sup>7</sup> The young African-American male, equipped with court-appointed attorneys, was convicted and sentenced to death by an all white Smith County jury in East Texas.<sup>8</sup> In all of his time on death row, Napoleon has never had any physical contact with anyone outside of the infamous Ellis Unit in Huntsville.<sup>9</sup>

Though he is only twenty-three years old, numerous life-changing events have taken place in Napoleon's life over the last six years. His parents, Rena and Ireland, hired a quality capital post-conviction appeals attorney after Napoleon's conviction.<sup>10</sup> In addition, Napoleon's older sister had a baby, making Napoleon an uncle.<sup>11</sup> Napoleon's younger brother started high school, and currently competes on the football team

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4. See Interview with Napoleon Beazley, Texas Death Row Inmate #999141, in Huntsville, Tex. (Dec. 13, 1999) [hereinafter Interview with Napoleon Beazley] (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

5. See *id.*

6. See *Offender Information Napoleon Beazley*, *supra* note 3; see also Interview with Napoleon Beazley, *supra* note 4.

7. See Death Penalty Information Center, *Case Summaries for Current Death Row Inmates Under Juvenile Death Sentences, June 1999* (visited Feb. 18, 2000) <<http://www.essential.org/dpic/juvcases.html>> [hereinafter *Case Summaries for Current Death Row Inmates*]. Beazley is one of 70 currently on death row in the United States for crimes they committed as a juvenile. See *id.*

8. In Smith County, the population is overwhelmingly white. See U.S. Census Bureau, *1990 U.S. Census Data*, County Information-Smith (visited Feb. 18, 2000) <<http://venus.census.gov/cdrom/lookup/950914673>>. Thus, the odds of having a majority of white jurors on a capital trial are high. According to the 1990 census, the population of Smith County, Texas was 151,309. See *id.* The percentage of African-American people in Smith County was about 20 percent according to the same census data. See *id.* Interestingly, Smith County has convicted 10 of the prisoners that currently reside on death row. See Texas Department of Criminal Justice, *TDCJ Death Row List* (visited Feb. 18, 2000) <<http://www.tdcj.state.tx.us/statistics/deathrow/drow-list.htm>> [hereinafter *TDCJ Death Row List*] (listing all of the inmates currently on death row in Texas, including the men from Smith County). Of those 10, 80 percent (eight) are African American. See *id.*

9. The Ellis Unit is located 12 miles north of Huntsville, Texas, in Walker County. See Texas Department of Criminal Justice, *Directory, Unit Profiles—Ellis* (visited Feb. 18, 2000) <<http://www.tdcj.state.tx.us/directory/unit-profiles/dir-units-ellis.htm>> [hereinafter *Unit Profiles—Ellis*]. Ellis opened in 1965, and currently employs over 750 employees. See *id.*

10. See Interview with Napoleon Beazley, *supra* note 4. David Botsford, who formerly represented Karla Faye Tucker, is Beazley's attorney, and is being assisted by fellow appellate attorney Walter Long. See *id.*

11. See *id.*

and in the marching band at Grapeland High School in a small East Texas community.<sup>12</sup>

Napoleon made new friends in prison and has remained loyal while friends from his past have faded away.<sup>13</sup> He has experienced the abandonment of close friends from his childhood, and at the same time friends from his new home have been executed by the State of Texas.<sup>14</sup> However, Napoleon is fortunate in some areas of his life, as demonstrated by the fact that he has an excellent appellate attorney,<sup>15</sup> and a family that continues to support and love him.

Even though inmates on death row come from varying backgrounds and have different experiences on death row, there is one thing all death row inmates in Texas have in common. Neither Napoleon, nor any other death row inmate in Texas, is allowed any physical contact with anyone outside of the prison.

The state of Texas currently has a rigid policy for death row inmates when it comes to contact visits.<sup>16</sup> Not only is contact forbidden between inmates and their families, but the possibility of physical touch is also prohibited between an inmate and his attorney.<sup>17</sup> Notably, the state's ban on contact visits is complete and includes the hours before execu-

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12. *See id.* Napoleon's younger brother, Jamal, plays the tuba in the band, and plays on the offensive line on the football team. *See id.*

13. *See id.*

14. *See id.*

15. David Botsford, Napoleon's appellate attorney, attained national exposure in 1997 after he was featured on numerous television programs and in newspaper articles. *See* Melissa Prentice, *Death Penalty Issue Turns Into One of More or Less*, SAN ANTONIO EXPRESS-NEWS, Feb. 5, 1999, at 1A; Kathy Walt, *Clemency Rules May Change for Prisoners on Death Row*, HOUS. CHRON., Apr. 17, 1998, at A31; John Burnett & Bob Edwards, *Morning Edition: Tucker Executed* (National Public Radio Broadcast, Feb. 4, 1998) (transcript available in Lexis News Transcript #98020409-210). He served as the appellate attorney for Karla Faye Tucker, the first woman to be executed in Texas in the past century. *See* Prentice, *supra* (quoting David Botsford as saying, "Karla's case got people to stop and think about the death penalty . . ."); Walt, *supra*; Burnett & Edwards, *supra* (detailing an NPR radio interview in which Botsford claimed that the State of Texas had killed an up-right person when Tucker was executed).

16. *See* Telephone Interview with Larry Fitzgerald, Spokesperson for the Texas Department of Criminal Justice (Jan. 10, 2000) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) [hereinafter Interview with Larry Fitzgerald].

17. *See id.*; Telephone Interview with Walter Long, Capital Appellate Attorney (Dec. 14, 1999) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) [hereinafter Interview with Walter Long] (summarizing the substandard conditions that Texas provides for attorney/client conversations on death row).

tion.<sup>18</sup> In other words, a mother in Texas is not allowed to hug her son or daughter one last time before they are executed.

The State of Texas, which has historically advocated a "law and order"<sup>19</sup> platform, continues to be tough on its incarcerated population. Unfortunately, Texas officials have ample opportunity to enforce its "law and order" policies regarding death row inmates, as evidenced by the State's methodical execution process, and the continuing growth of death row.<sup>20</sup> Currently, the death row population in the State of Texas is the second largest in the nation, numbering well over 370 inmates.<sup>21</sup> Texas is recognized by other states as an expert in administering capital punishment.<sup>22</sup> Historically, no state's execution figures approach the numbers found in Texas.<sup>23</sup>

The purpose of this comment is not to argue the merits of the death penalty. This comment will propose that Texas change its policy regarding contact visits for death row inmates. Reasons, such as security con-

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18. See Telephone Interview with Larry Fitzgerald, *supra* note 16. Families of death row inmates cannot see their loved one on the day of the execution, until "they are strapped to the gurney." See *id.*

19. Andrew Hammel, *Discrimination and Death in Dallas: A Case Study in Systematic Racial Exclusion*, 3 TEX. F. ON C. L. - C. R. 187, 227 (1998). Many commentators have acknowledged the political pressure in Texas on criminal judges especially in capital cases, to uphold a reputation of being tough on crime.

20. See, e.g., Nancy Dunne, *Little Clemency on Death Row in Bush's Texas*, FIN. TIMES (LONDON), Feb. 16, 2000, at 9. Texas executes inmates at the highest rate in the Western world. Martin Kasindorf, *Texas Continues Execution Record*, USA TODAY, May 23, 1997, at 3A (acknowledging that Texas has been executing inmates at a record setting pace); Sam Howe Verhovek, *Death on a Schedule: A Special Report, As Texas Executions Mount, They Grow Routine*, N.Y. TIMES, May 25, 1997, at 1 (noting that in Texas, executions are becoming a standard routine).

21. See Jeffrey J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1817 (1998) (illustrating through tabular information the number of death row inmates in each state that has the death penalty). California has the most death row inmates in the country, with close to 500 inmates. See *id.*; Death Penalty Information Center, *Death Row Inmates by State* (visited Feb. 19, 2000) <<http://www.essential.org/dpic/dpic5.html>> [hereinafter *Death Row Inmate by State*].

22. New Mexico, Tennessee, California, New York, Colorado, and the federal government have looked to Texas as an authority on execution matters. See Michael Haederle, *New Mexico to Learn About Executions*, DALLAS MORNING NEWS, Sept. 20, 1999, at 17A. In September 1999, officials from New Mexico were invited to travel to Texas to learn more about the actual execution process. See *id.* They were scheduled to witness the execution of former Texas death row inmate Richard Smith, and were educated by Texas officials on topics such as media requests and dealing with family members before an execution. See *id.*

23. See Death Penalty Information Center, *Number of Executions by State Since 1976* (visited Feb. 25, 2000) <<http://www.essential.org/dpic/dpicreg.html>> (displaying the number of executions in Texas to be more than twice as many as the second highest state, Virginia) [hereinafter *Number of Executions by State Since 1976*].

cerns and tougher punishment, that Texas has historically relied upon for keeping its "no physical contact" policy are outweighed by standards of common decency and basic human rights.<sup>24</sup> Furthermore, not allowing a family to have contact visits with their relatives on death row should be considered a violation of the Eighth Amendment's protection against "cruel and unusual punishment."<sup>25</sup> The state's administration of visits between death row inmates and their attorneys violates the Sixth Amendment right to counsel.<sup>26</sup> The attorney-client privilege may also be violated because prison officials do not allow private visits between attorneys and their clients.<sup>27</sup>

In addition to the general prohibition of contact visitation, the State of Texas extends its policy to forbid "last hugs" immediately before execution.<sup>28</sup> Texas' official reasons for not allowing a mother to hug her son or daughter one last time before executions are few. Texas Department of Criminal Justice (TDCJ) Spokesperson, Larry Fitzgerald, claims that even though security becomes less of a concern in the hours leading up to an execution, it is still the only reason for not allowing a last hug between a family member and the condemned inmate.<sup>29</sup>

This comment will focus on Texas' policies regarding contact visits for death row inmates. In addition to those in Texas, other death penalty states' administrative rules regarding visits will be analyzed. Nationwide, Texas places itself in a small minority as far as contact visitation for death row inmates is concerned. Even in a state that prides itself on being "tough on crime,"<sup>30</sup> it is important for the criminal jus-

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24. See generally Death Penalty Information Center, *The Death Penalty: An International Perspective* (visited Feb. 18, 2000) <<http://www.essential.org/dpic/dpicintl.html>> (ranking the countries of the world according to the number of executions performed in 1998 and exhibiting the small minority the United States finds itself in). The reason for the United States being in a small minority is that many countries throughout the world have abolished the death penalty, citing moral objections as at least one of the reasons for its eradication. See *id.*

25. See U.S. CONST. amend. VIII.

26. See U.S. CONST. amend. VI.

27. See generally *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (ruling that the attorney-client privilege belongs to the client alone). This leads to speculation as to whether a government entity (the prison) can infringe on the communications between an attorney and his/her death row client.

28. See Telephone Interview with Larry Fitzgerald, *supra* note 16.

29. See *id.*

30. See Hammel, *supra* note 19, at 227-28 (acknowledging that Texas judges deliver judicial opinions which are tough on crime). The Texas criminal justice system seems inclined to not enforce the constitutional rights of criminal defendants, and there are no signs of changing this practice until Texas reforms its judicial system. See *id.*

tice system to show some "compassion" to go along with its "conservatism."<sup>31</sup>

In order to properly illustrate the existing climate in Texas, Part II of this comment will examine the recent history of conservative politics and their relation to the Texas death penalty. This section will also include a brief history of the death penalty in America. After a sufficient historical foundation is laid, Part III will concentrate on regular contact visits for death row inmates and their families. This portion will detail the Texas policy regarding regular contact visits, as well as a final visit or "last hug" before execution. Part IV will discuss contact visitation between attorneys and their clients on death row. Relevant case law and other state policies will be analyzed. Part V will suggest policy changes that should take place in Texas in respect to contact visits for death row inmates. Part VI will summarize the issues presented with a short conclusion of the topic.

## II. A RECENT HISTORY OF THE DEATH PENALTY, CONSERVATIVE TEXAS POLITICS, AND SUBSEQUENT INTERNATIONAL CONCERNS

### A. *Recent History of the Death Penalty*

After a national moratorium on the death penalty in 1967,<sup>32</sup> the Supreme Court of the United States ruled in *Furman v. Georgia*,<sup>33</sup> that the death penalty, in its then current form, was unconstitutional.<sup>34</sup> The holding in *Furman* required states to radically modify their sentencing procedures for capital offenses if they decided to impose the death penalty.<sup>35</sup> Immediately after *Furman*, thirty-five states changed their murder

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31. Current Texas Governor, George Bush proudly labels himself as a "compassionate conservative." See Mary Leonard, *Bush's Record Steadily Tough on Drug Users*, BOSTON GLOBE, Aug. 26, 1999, at A1 (noting the disparity between Bush's presidential campaign message of 'forgiveness', and his strong conservative record on criminal justice matters). As far as his stance on crime and punishment, Bush is on the right of the political pendulum. See *id.*

32. See Raymond J. Pascucci, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1130 & n.3 (1984) (revealing that constitutional challenges brought forth by the NAACP Legal Defense and Educational Fund led to an unofficial moratorium on the death penalty).

33. *Furman v. Georgia*, 408 U.S. 238 (1972).

34. See *id.* (noting that the death penalty, as implemented, was unconstitutional and constituted cruel and unusual punishment which violated the Eighth and Fourteenth Amendments).

35. See J. Chandler Bailey, Note, *Death is Different, Even on the Bayou: The Disproportionality of Crime and Punishment in Louisiana's Capital Child Rape Statute*, 55 WASH. & LEE L. REV. 1335, 1352 (1998).

statutes, and reinstated the death penalty as punishment for murder.<sup>36</sup> This led the Supreme Court to believe that the public endorsed the death penalty as a means of punishment for murder, and it eventually retreated from the *Furman* decision.<sup>37</sup>

In 1976, the Court in *Gregg v. Georgia*,<sup>38</sup> decided that the death penalty is not per se cruel and unusual.<sup>39</sup> Specifically, the Court ruled that Georgia's bifurcated system of trying capital cases was constitutional.<sup>40</sup> The Court in *Gregg* ruled that capital punishment did not violate the Federal Constitution, and that it was up to the states to determine whether their own constitutions provided for a greater amount of protection.<sup>41</sup> In that same year the Court, in *Jurek v. Texas*,<sup>42</sup> ruled that the State of Texas' death penalty procedures were constitutional.<sup>43</sup>

The death penalty resurfaced as a form of criminal punishment in the United States in 1977, when Gary Gilmore was executed in Utah by a firing squad.<sup>44</sup> Five years later, on December 7, 1982, in its first post-*Gregg* execution, Texas lethally injected Charlie Brooks, Jr. from Tarrant County with a combination of deadly poisons.<sup>45</sup> Texas thereby became the first state in the country to use the method of execution known as lethal injection.<sup>46</sup>

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36. *See id.*

37. *See id.*

38. *Gregg v. Georgia*, 428 U.S. 153 (1976).

39. *See id.* at 207.

40. *See id.*

41. *See id.* at 186-87 (addressing the Supreme Court's deference to state legislatures in the area of capital sentencing statutes).

42. *Jurek v. Texas*, 428 U.S. 262 (1976).

43. *See id.* at 276.

44. *See* Robert M. Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815, 829 (1986).

45. *See* Texas Department of Criminal Justice, *Executed Offenders* (last modified Feb. 11, 2000) <<http://www.tdcj.state.tx.us/stat/executedoffenders.htm>> [hereinafter *Executed Offenders*]; Texas Department of Criminal Justice, *Texas Death Row and Execution History* (last modified Dec. 31, 1999) <<http://www.tdcj.state.tx.us/statistics/deathrow/drow-history.htm>> [hereinafter *Texas and Death Row Execution History*].

46. *See Texas Death Row and Execution History*, *supra* note 45. Lethal injection, although perceived to be a more humane form of execution, is not without its critics. *See* STEPHEN TROMBLEY, *THE EXECUTION PROTOCOL* 73-74 (1992); *see also* Roberta M. Harding, *The Gallows to the Gurney: Analyzing the (Un)Constitutionality of the Methods of Execution*, 6 B.U. PUB. INT. L.J. 153, 175 (1996) (formulating that there is a greater risk of an inmate not being able to communicate that he is in pain during lethal injection due to the paralyzing affect of the first drug). Even though the use of lethal injection is generally looked upon as a more humane and painless form of capital punishment, there have been complaints of its brutality. *See id.*



In a process that takes about seven minutes, three chemicals are introduced through the veins of the inmate in order to terminate life.<sup>47</sup> Despite the critics, Texas has used lethal injection as a means of execution for the past two decades.<sup>48</sup> Lethal injection has generally been accepted as the method of choice for executioners throughout the country.<sup>49</sup> The common perception that the process of lethal injection is more humane<sup>50</sup> is one of the reasons for capital punishment's popularity today.<sup>51</sup>

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47. See Texas Department of Criminal Justice, *Statistics: Death Row* (last modified Jan. 27, 2000) <<http://www.tdcj.state.tx.us/stat/drowfacts.htm>>. A lethal dose of Sodium Thiopental is the first chemical introduced into an inmate's body in order to sedate him. See *id.* Next, Pancuronium Bromide is injected into the bloodstream, which collapses the diaphragm and lungs. See *id.* Finally, a dosage of Potassium Chloride is given to stop the heartbeat of the inmate. See *id.*

48. See Death Penalty Information Center, *Texas* (visited Feb. 19, 2000) <<http://www.essential.org/dpic/texas.html>>. As of February 16, 2000, all 206 executions that have been carried out by Texas have been through the means of lethal injection. See Rick Halperin, Southern Methodist University, *Execution Statistics Summary* (visited Feb. 19, 2000) <<http://www.smu.edu/~deathpen/summary.html>>; Death Penalty Information Center, *Authorized Methods of Execution by State* (visited Feb. 19, 2000) <<http://www.essential.org/dpic/methods.html>> [hereinafter *Authorized Methods of Execution by State*].

49. See Death Penalty Information Center, *Executions since 1976 by Method Used* (last modified Feb. 25, 2000) <<http://www.essential.org/dpic/dpicexec.html>> (displaying statistics detailing the method used in each of America's executions over the past 22 years). Since 1976, lethal injection has been used as the method of putting an inmate to death in over 73% of all executions. See *id.*

50. See generally Steve Lash, *Justices to Rule on Electric Chair; Constitutional Debate on Punishment Puts Execution on Hold*, HOUS. CHRON., Oct. 28, 1999, at A12 (inferring that the increased use of lethal injection as a form of execution perpetuates a perception that lethal injection is the more humane method of execution). Critics have condemned the other major form of execution, electrocution, as cruel and unusual punishment, leaving lethal injection as the only major means of state execution. See *id.*

51. The decision to administer death by lethal injection came after a few other techniques were used in the state of Texas. See Brent E. Newton, *A Case Study in Systematic Unfairness: The Texas Death Penalty, 1973-1994*, TEX. F. ON C.L. - C.R., Spring 1994, at 1, 3. Beginning in 1924, Texas initiated the process of formal punishment on a state level of condemned criminal defendants via executions. See *id.*; see also *Texas Death Row and Execution History*, *supra* note 45. Between 1924 and 1964, the state of Texas electrocuted 361 people of the 506 persons on death row. See *id.* Before attaining the electric chair, executions were carried out by hanging on a county level. See Brent E. Newton, *supra*. After building the electric chair from oak in the 1923-1924, it was used in Texas from 1924 through 1977. See *Texas Death Row and Execution History*, *supra* note 45. Nicknamed "Old Sparky," the original electric chair was located behind the chapel in the Huntsville Unit. See *id.* Electrocution has since fallen out of vogue nationwide in states that administer the death penalty. Currently, there are only four states that use electrocution as their sole method of execution. See *Authorized Methods of Execution by State*, *supra* note 48. (acknowledging Alabama, Georgia, and Nebraska as the three states that use electrocution as the only means of execution).

Regardless of what form of execution has been used, questions have always surfaced concerning the fairness of capital punishment in Texas. From 1924 to 1964, the State of Texas certainly was not executing the political and social elites of society.<sup>52</sup> Further, Texas has consistently executed inmates that committed crimes against white victims.<sup>53</sup> The trend toward valuing white victims more than people of color continues today not just in Texas, but nationwide. For instance, from 1976 to January 30, 1996, 318 people were executed in the United States.<sup>54</sup> In those cases, over eighty-two percent of the victims were white.<sup>55</sup> In addition, a great majority of the inmates currently on death row in America are indigent.<sup>56</sup> Thus, not only is it evident that the current process of capital punishment is racist, it also appears to discriminate against the poor.<sup>57</sup>

### B. *Conservative Texas Politics*

The *Gregg* and *Jurek* decisions opened the door for Texas to become the death penalty capital of the world.<sup>58</sup> In Texas, the death penalty is big business,<sup>59</sup> and politicians are well aware of the state's support of the

52. See Brent E. Newton, *supra* note 51, at 3 (commenting that "the Texas death penalty was used almost exclusively against the young, the ignorant and impoverished, racial minorities, and the mentally disturbed").

53. See *id.*

54. See NAACP Legal Defense and Educational Fund, Inc., *Execution Update*, Jan. 30, 1996 (visited Feb. 18, 2000) <<http://www.igc.org/africanam/archives/eh2/EXUD.html>> [hereinafter *NAACP: Execution Update*].

55. See Walter Berns et al., *The Death Penalty: A Philosophical and Theological Perspective*, 30 J. MARSHALL L. REV. 463, 482 (1997); *NAACP: Execution Update supra* note 54.

56. See Brian L. McDermott, Comment, *Defending the Defenseless: Murray v. Giaratano and the Right to Counsel in Capital Postconviction Proceedings*, 75 IOWA L. REV. 1305, 1312 (1990) (estimating that 99.5% of all death row inmates are indigent); Brad Snyder, Note, *Disparate Impact on Death Row: M.L.B. and the Indigent's Right to Counsel at Capital State Postconviction Proceedings*, 107 YALE L.J. 2211, 2238 (1998).

57. See Stephen B. Bright, *The Politics of Crime and the Death Penalty: Not "Soft on Crime," But Hard on the Bill of Rights*, 39 ST. LOUIS U. L.J. 479, 483 (1995) (stating that there are few in society today who rise to the challenge of safeguarding the integrity and fairness in the system, and it is the least among us – "the poor, the members of minorities and the despised" – that are most in need of protection today) (emphasis added).

58. Irene Merker Rosenberg & Yale L. Rosenberg, *Lone Star Liberal Musings on "Eye for Eye" and the Death Penalty*, 1998 UTAH L. REV. 505, 507 (1998); see also John Jenswold, *Big Prisons Won't End Crime*, CAPITAL TIMES, May 21, 1998, at 14A. Despite ranking among the highest crime states, Texas boasts more death penalty cases than any possible combination of states, and has one of the toughest prison programs in the nation. See *id.*

59. See Newton, *supra* note 51, at 2 (remarking that Texas' death row is a billion-dollar industry).

death penalty.<sup>60</sup> As an example of how much emphasis is placed on the death penalty in Texas, if Harris County were a state, it would rank third in the Union in total executions<sup>61</sup> since the death penalty was reinstated in America in 1976.<sup>62</sup> Most high level politicians in Texas are diametrically opposed to a complete abolition of the death penalty.<sup>63</sup> For example, during the 1990 gubernatorial race in Texas, the candidates employed a considerable amount of effort attempting to outdo one another on the issue of how supportive they were of capital punishment.<sup>64</sup> One of the candidate's campaign ads showed him walking in a room with pictures of all of the men that had been executed during his tenure in office.<sup>65</sup> Current Presidential candidate, George W. Bush, is also an "unapologetic supporter" of the death penalty.<sup>66</sup> Nationwide, politicians have used the death penalty as a way to strengthen their chances at winning an election.<sup>67</sup> Likewise, Texas politicians have also wholeheartedly supported the death penalty, in the past as well as in the present, in order to gain support with the state's voters.

The primary reason for politicians zealously advocating for the use of the death penalty in Texas is the population's ideology. The voting population in Texas has always been conservative, and supportive of capital punishment. In fact, Texas has a long history of supporting conservative

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60. See, e.g., Michael Mello, *A Letter on a Lawyer's Life of Death*, 38 S. TEX. L. REV. 121, 203 (1997) (arguing that candidates focusing on the "executioner's song" has become a common occurrence during campaigning); Newton, *supra* note 51, at 5-6.

61. See Rick Halperin, Southern Methodist University, *Texas County Executions Compared to States* (visited Feb. 18, 2000) <<http://www.smu.edu/~deathpen/texas-county.html>> (affirming that Harris County would rank third behind the remainder of Texas counties and Virginia); see also Newton, *supra* note 51, at 3. A disproportionate number of those sentenced to death in the United States come from Harris County, Texas. See *id.* Harris County has been labeled "the death penalty capital of the world." *Id.*

62. See *Gregg v. Georgia*, 428 U.S. 153, 207 (1976).

63. See, e.g., Chris Wattie, *'They Oughta Just Take 'Em Out and String 'Em Up'*, TORONTO STAR, Dec. 7, 1998, at A12 (reporting that Texas Governor, George Bush, has been elected twice due in large part to his law and order platform, including his unyielding support for the death penalty).

64. See Newton, *supra* note 51, at 5-6.

65. See *id.* at 6.

66. See Marc Sandalow, *For Bush, The Record Tells All: Governor's Actions in Texas Please Core Conservatives*, S.F. CHRON., June 29, 1999, at A1. Governor George Bush is "pro-business, pro-guns, pro-death penalty, anti-tax, anti-abortion, and anti-affirmative action." *Id.* Bush has been criticized by labor leaders, environmentalists and advocates of the poor. See *id.* His stance on the death penalty is seen as a "political strength" in a state that has executed the most people of any state in the nation. See *id.*

67. See Leigh Dingerson, *Reclaiming the Gavel: Making Sense Out of the Death Penalty Debate in State Legislatures*, 18 N.Y.U. REV. L. & SOC. CHANGE 873, 884 (1990-91).

politicians.<sup>68</sup> Although the death penalty seems to be supported by a majority of politicians nationwide, conservative politicians are most vocal in their support of capital punishment.<sup>69</sup> Texas' support for both conservative politicians and the death penalty is bolstered by studies which show that an overwhelming majority of Americans support capital punishment.<sup>70</sup> Nationwide, support of the death penalty ranges from sixty-nine to seventy-five percent.<sup>71</sup> However, in Texas the number reflecting support jumps to near ninety percent.<sup>72</sup>

Texans have long supported conservative politicians on a national level. A majority of Texan voters endorsed Richard Nixon in 1972, Ronald Reagan in 1980 and 1984, George Bush in 1988 and 1992, and Bob Dole in 1996.<sup>73</sup> Furthermore, over half a million Texans voted for known segregationist George Wallace in the 1968 presidential election.<sup>74</sup> During a hotly contested battle for governor in 1990, conservative Republican Clayton Williams proclaimed, "If you elect me dictator, I'll behead 'em."<sup>75</sup> Surprisingly, Williams lost the election by only a small margin.<sup>76</sup> In addition to Williams, current United States Senator Phil Gramm has enjoyed widespread support in Texas.<sup>77</sup> Phil Gramm proudly proclaims

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68. See generally Barbara Bader Aldave, *Women in the Law in Texas: The Stories of Three Pioneers*, 25 ST. MARY'S L.J. 289, 294-95 (1993) (referring to the story of Judge Sarah Hughes, who was defeated in her two bids for elective office because she was a "political liberal living in a conservative stronghold" called Texas). Hughes was an admirable woman of conviction and drive throughout her career. See *id.* at 294.

69. See Laurence A. Grayer, Comment, *A Paradox: Death Penalty Flourishes in U.S. While Declining Worldwide*, 23 DENV. J. INT'L L. & POL'Y 555, 561 (1995) (The Republican Congress is determined to be tough on crime, which is exemplified in their strong support of the death penalty).

70. See JOHN D. BESSLER, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* 130 (1997).

71. See *id.* (referring to the results of a poll conducted by ABC News and the Washington Post and another poll conducted by NBC News and the Wall Street Journal).

72. See *id.* (emphasizing the fact that public support for the death penalty is overwhelmingly high in the South, and that nine out of every ten Texans support capital punishment).

73. See State of Texas, *Texas Past Presidential Election Results* (visited Feb. 18, 2000) <<http://www.sos.state.tx.us/function/elec1/results/prezstat.htm>> [hereinafter *Texas Past Presidential Election Results*]; see also Keith Bradsher, et al., *1996 Elections: State by State; South*, N.Y. TIMES, Nov. 6, 1996 (reporting that Bob Dole had received all of Texas' 32 electoral votes in the 1996 presidential election).

74. See *Texas Past Presidential Election Results*, *supra* note 73.

75. Larry Tye, *Where Brawling and Bruising Help Win Votes; Candidates Uphold a Texas Tradition*, BOSTON GLOBE, Aug. 14, 1990, at 1.

76. See *Final Election Results: Pennsylvania through Wyoming (Including U.S. Territories)*, USA TODAY, Nov. 8, 1990, at 10A (asserting that Ann Richards narrowly defeated Clayton Williams to become Governor of Texas in 1990 by a 51% to 49% margin).

77. See United States Senate, *United States Senator Phil Gramm Biography* (visited Feb. 18, 2000) <<http://www.senate.gov/~gramm/bio.html>> [hereinafter *Phil Gramm*] (not-

himself to be among the most conservative members of Congress.<sup>78</sup> Currently, Republican politicians are dominant in the State of Texas. Republicans now represent the State of Texas in the elected positions of Governor<sup>79</sup> and Lieutenant Governor.<sup>80</sup> Furthermore, the two Senators that represent Texas in the United States Senate are also Republican, Kay Bailey Hutchinson<sup>81</sup> and Phil Gramm.<sup>82</sup> Most importantly from a capital punishment standpoint, all nine of the judges on the Texas Court of Criminal Appeals (the highest criminal court in the state) are Republicans.<sup>83</sup> Overall, conservative politics have always been significant in Texas' implementation of capital punishment.

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ing that Gramm first became a U.S. Senator in 1984, when he garnered more votes than any other candidate in the history of Texas statewide elections).

78. See *The Impeachment Trial: The Day at a Glance: It's Down to the Wire*, ORANGE COUNTY REG., Feb. 9, 1999, at A8; see also Maria Recio, *Senators Disagree on Why Parties Split*, FORT WORTH STAR-TELEGRAM, Jan. 30, 1999, at 19.

79. See Sandalow, *supra* note 66 (noting that Governor Bush is a "solid Republican"). George Bush, during his terms as governor, has emerged at the forefront of the international struggle against the death penalty. See *id.* On June 17, 1999, the State of Texas executed Canadian citizen Stanley Faulder. See Bruce Tomaso, *Canadian Man Executed in Texas*, DALLAS MORNING NEWS, June 17, 1999, at B1. The execution raised many concerns that the state of Texas was not complying with international law. See Canadian Coalition Against the Death Penalty, *Texas Kills!* (last modified Mar. 6, 1999) <<http://members.tripod.com/ccadp/boycott.htm>> [hereinafter *Texas Kills*] (displaying the phrase, "Like Iraq . . . Like China . . . Like the Sudan, Texas, It's Like a Whole Other Country"). The pending execution prompted a group of Canadian reporters to ask Governor Bush what he would tell their countrymen who think of Texas as a remnant of the Wild West: "If you're Canadian and you come to our state, don't murder anybody," Bush responded. Sandalow, *supra*. Governor Bush's strong stance on the issue has prompted the organization known as the "Canadian Coalition Against the Death Penalty" to organize an international boycott of tourism in the State of Texas. See *Texas Kills*, *supra*.

80. See Texas State Senate, *Lieutenant Governor Rick Perry* (visited Feb. 18, 2000) <<http://www.senate.state.tx.us/75r/lrgov/Bio.htm>> (describing basic biographical information about Lieutenant Governor Perry). Rick Perry was sworn in as Lieutenant Governor of Texas on January 19, 1999. See *id.* He is a fifth generation Texan, and served as a member of the Texas House of Representatives from 1985-1990. See *id.* Perry, a former rancher and farmer, also held the post of Commissioner of Agriculture for the eight years before becoming Lieutenant Governor. See *id.*

81. See The United States Senate, *United States Senator Kay Bailey Hutchison-Biography* (visited Feb. 18, 2000) <<http://www.senate.gov/~hutchison/bio.htm>> (noting that Kay Bailey Hutchinson is the first woman to represent Texas in the United States Senate). Senator Hutchison was instrumental in helping to pass landmark welfare reform legislation in 1996. See *id.*

82. See Phil Gramm, *supra* note 77. (noting that Phil Gramm, a College Station native and Republican, has served as a United States Senator since 1984). Gramm was instrumental in stopping President Bill Clinton's Health Care Bill. See *id.*

83. See Clay Robison, *Judge Decides Against Running for Second Term*, HOUS. CHRON., July 21, 1999, at A23 (stressing that the Court of Criminal Appeals was entirely Republican in Texas); see also Court of Criminal Appeals, *Biographies of the Court of*

### C. *Subsequent International Concerns*

Presently, Texas' trend toward conservative politics has led to a negative portrayal of the state in the international community.<sup>84</sup> This disapproving depiction stems from the perception that Texas is violating human rights standards through its liberal use of the death penalty. Texas' use of the death penalty is in stark contrast to many countries throughout the world. Numerous countries have discontinued the use of capital punishment.<sup>85</sup> Currently, the United States is the only member nation of the North Atlantic Treaty Organization (NATO)<sup>86</sup> that executes its citizens.<sup>87</sup> In addition, Texas is the leader in executions among American jurisdictions.<sup>88</sup> The path that conservative politics has taken in Texas, especially with regard to the execution of juvenile and mentally retarded offenders, has only increased criticism from the international community.<sup>89</sup>

#### 1. Execution of Juveniles

International law dictates that offenders under the age of eighteen during the commission of their crime should not be executed.<sup>90</sup> However,

*Criminal Appeals* (visited Feb. 18, 2000) <[http://www.cca.courts.state.tx.us/coa\\_bios.htm](http://www.cca.courts.state.tx.us/coa_bios.htm)> (noting that Michael J. McCormick, Lawrence E. Myers, Steve Mansfield, Sharon Keller, Tom Price, Sue Holland, Paul Womack, Cheryl Johnson, and Michael Keasler make up the current Court of Criminal Appeals in Texas). In Texas, the judges on the Court of Criminal Appeals are elected. *See id.*

84. *See Texas Kills*, *supra* note 79. (reporting that groups in Italy, Denmark, France, Germany, and Slovenia have joined the Canadian Coalition to Abolish the Death Penalty in an international tourist boycott of Texas).

85. *See* Amnesty Int'l, *The Death Penalty-List of Abolitionist and Retentionist Countries* (last modified Dec. 18, 1999) <<http://www.amnesty.org/ailib/intcam/dp/abrelist.htm>> (listing 106 countries that have abolished the death penalty either in law or in practice).

86. *See* North Atlantic Treaty Organization, *Welcome to NATO* (last modified Jan. 27, 2000) <<http://www.nato.int/welcome/home.htm>> (providing information about the history and current mission of NATO). NATO is a worldwide peace keeping organization formed after World War II. *See id.* It is an international alliance that was created originally to perform peacekeeping duties in Europe. *See id.*

87. *See* Amnesty Int'l, *The Death Penalty: Texas and the USA* (last modified Sept. 12, 1999) <<http://www.inetport.com/~ai500/TX&USA91299.html>>.

88. *See Number of Executions by State*, *supra* note 49. Texas has executed approximately three times as many inmates as its nearest competitor, Virginia, since 1976. *See id.* In 1999, Texas executed 35 people, while the three states closest in number of executions totaled 24 combined. *See id.*

89. *See Texas Kills*, *supra* note 79. (affirming the criticism of Texas by the international community).

90. *See* International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171, 175 (entered into force Mar. 23, 1976) (mandating certain international norms which should apply to all the world's children). At least six international instruments relating to human rights have condemned the execution of

the United States, along with Saudi Arabia, Iran, Nigeria, Pakistan, and Yemen, are the only countries in the world who have executed juvenile offenders in the 1990's.<sup>91</sup> The United States has been particularly zealous in this aspect. There have been sixteen executions of juvenile offenders in the United States, and eight of those were carried out in Texas.<sup>92</sup> At least one Texas prison official believes that Texas has not executed any juveniles<sup>93</sup> due to the use of a certification process that certifies kids to stand trial as adults.

Currently, there are twenty-two offenders who were juveniles at the time of the offense, and are now awaiting execution on Texas' death row.<sup>94</sup> Of these twenty-two offenders, nineteen are minorities and only

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juvenile offenders. Most notably, the United Nations' *International Covenant on Civil and Political Rights* (ICCPR), Article Six, Section Five states that a "sentence of death shall not be imposed for crimes committed by persons below eighteen years of age." See Amnesty International, *Juveniles and the Death Penalty - Executions Worldwide Since 1990* (last modified Nov. 1998) <<http://www.amnesty.org/ailib.aipub.1998/ACT/A5007798.htm>> [hereinafter *Juveniles and the Death Penalty*] (noting the emerging international consensus that adolescent offenders should not be subject to capital punishment). When the United States ratified the ICCPR in 1992, it made a "reservation" as to juvenile executions. See *id.* In other words, the United States essentially exempted itself from Article Six, Section Five. However, the UN Human Rights Committee has said that the "reservation" is invalid, and the United States should retreat from this position. See *id.*; see also *Urgent Actions Against the Death Penalty* (visited Nov. 19, 1999) <<http://www.smu.edu/~deathpen/action.html>> [hereinafter *Urgent Actions Against the Death Penalty*] (enlightening the general public to the case of Michael Domingues). On June 7, 1999, the Supreme Court of the United States asked the Solicitor General to file a brief with the Court in the case of *Domingues v. State*. See *Domingues v. Nevada*, 119 S. Ct. 2044 (1999) (revealing the Supreme Court's request for a Solicitor General brief); see also *Urgent Actions Against the Death Penalty, supra*. (noting the importance of the Supreme Court's request). The Solicitor General's brief was to detail the United States government's view of their international obligation relating to the execution of juvenile offenders. See *id.* After the Solicitor General brief was filed in the *Domingues* case, the Supreme Court subsequently denied certiorari in the case. See *Domingues v. Nevada*, 120 S.Ct. 396 (1999).

91. See *Juveniles and the Death Penalty, supra* note 90; see also *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (condemning the proposed execution of a 15 year old, and claiming that the execution of this juvenile was inconsistent with international practice).

92. See *Texas and the USA, supra* note 87; Stephen K. Harper & Steven A. Drizin, *Death Row For Kids; The U.S. Is One of the Few Nations That Executes Juvenile Offenders*, CHI. TRIB., Feb. 10, 2000, at 23 (referring to three more juvenile executions that occurred in January 2000, including Glen McGinnis of Texas).

93. See Stan Grossfeld, *Kids Who Kill: Juveniles and the Death Penalty: U.S. Stands Alone on Executions*, BOSTON GLOBE, Nov. 29, 1999, at A1 (quoting Texas Criminal Justice spokesperson Larry Fitzgerald as saying "[w]e don't [kill] kids . . . [t]hey are certified as adults in the eyes of the law").

94. See Texas Department of Criminal Justice, *Death Row Inmates—17 Years of Age at Time of Offense* (last modified Oct. 4, 1999) <<http://www.tdcj.state.tx.us/statistics/deathrow/drow-17.htm>> [hereinafter *Death Row Inmates- 17 Years of Age at Time of Of-*

three are Anglo.<sup>95</sup> Amazingly, not only does Texas lead the free world in the execution of juveniles, but Texas is executing the very people the state has discriminated against so many times before — racial minorities.

## 2. Execution of the Mentally Retarded

Executing mentally retarded inmates has also garnered much criticism of Texas from international sources.<sup>96</sup> In *Penry v. Lynaugh*,<sup>97</sup> the Supreme Court ruled that it was not unconstitutional per se for states to execute mentally retarded persons.<sup>98</sup> *Penry*, a Texas case, made execution of the mentally retarded more accessible for Texas and other states.<sup>99</sup> As such, Texas has executed five inmates in the 1990's who were mentally retarded.<sup>100</sup> During the 1999 legislative term in Texas, an attempt was made to change the law in order to exclude the mentally retarded from the class of people who may be executed,<sup>101</sup> but the proposed legislation, opposed by Governor Bush, did not pass.<sup>102</sup>

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*fense*] (listing death row inmates in Texas who were under age 18 at the time of their offenses, considering that the information has not been updated to include the death of Glen McGinnis).

95. See *Death Row Inmates—17 Years of Age at Time of Offense*, *supra* note 94 (displaying a chart which lists the races of all the juvenile offenders on death row).

96. See Jon Carroll, *More Gray Walls, Thanks to Gray*, S.F. CHRON., May 19, 1999, at E10 (indicating that the United States is the only advanced Western country that executes the mentally retarded); John M. Goshko, *U.N. Panel Calls on U.S. to Halt Death Penalty*, WASH. POST, Apr. 4, 1998, at AO2 (asserting that a 1998 United Nations panel report urged the United States to discontinue capital punishment at least partly because of the practice of executing the mentally retarded); *135 Lands Violate Human Rights, Amnesty International Declares*, N.Y. TIMES, Oct. 5, 1988, at A14 (reporting that Amnesty International found the United States to be guilty of human rights violations in large part because of its implementation of capital punishment toward mentally retarded inmates);

97. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

98. See *id.* at 340 (opining that putting mentally retarded capital murderers to death, given this specific defendant's mental ability, was not expressly forbidden by the Eighth Amendment). Johnny Paul Penry had an IQ between 50 and 63, and the mental reasoning of a six and a half year old boy. See *id.* at 307-08.

99. See Thomas Criswell IV, Note, *Death Penalty: Rios Grande: The Texas Court of Criminal Appeals Examines Mental Retardation as a Mitigating Factor in Rios v. Texas*, 47 OKLA. L. REV. 373, 384 (1994) (describing how "[i]t was only a matter of time" before the *Penry* decision was interpreted in state death penalty proceedings).

100. See Death Penalty Information Center, *Mental Retardation and the Death Penalty* (last modified July 1, 1999) <<http://www.essential.org/dpic/dpicmr.html>> (charting all of the executions of mentally retarded people in the United States since 1976).

101. See Tex. S.B. 326, 76th Leg., R.S. (1999) (attempting to amend the capital statute to exclude the execution of the mentally retarded); see also Tex. H.B. 3069, 76th Leg., R.S. (1999) (seeking also to preclude the execution of mentally retarded inmates).

102. HB 326 was passed by the Senate but failed to make it out of House Committee. See Texas Legislature Online, Actions: SB326 (last modified Apr. 15, 2000) <<http://www./>



### III. REGULAR CONTACT VISITS AND "LAST HUGS" FOR DEATH ROW INMATES

In the spring of 1998, the Reverend Jesse Jackson<sup>103</sup> visited Texas' women's death row in Gatesville. Jackson visited Erica Sheppard, a twenty-four year old mother of three who was condemned to die for the 1993 murder of a Houston woman.<sup>104</sup> Sheppard had decided not to appeal her conviction, and was set to be executed on April 20, 1998.<sup>105</sup> Sheppard changed her mind, however, when her mother wrote Jackson and pleaded for his help.<sup>106</sup> Sheppard has three children that are all younger than ten.<sup>107</sup> Sheppard's youngest daughter, Audria, was only ten months old when her mother was sent to Gatesville.<sup>108</sup> Reverend Jackson met with Sheppard for about an hour, and described the visit as "touching."<sup>109</sup> However, Jackson did not leave with kind words for the contact visit policy set forth by the State of Texas. "She's not been able to hold that baby since she's been here,"<sup>110</sup> Jackson said. "That seems to be cruel and unusual punishment."<sup>111</sup>

Mr. Jackson raises a concern that many parents have voiced about the Texas death row contact visit policy. The argument carries weight because the "no contact visit" policy punishes more people than just the condemned inmate.<sup>112</sup> For example, the policy discriminates against mothers and fathers, and punishes them just because their son or daughter

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report?:LEG=76&SESS=R&CHAMBER=S&BILLTYPE=B&BILLSUFFIX=00326&SORT=html>.

103. See *National Rainbow Coalition, Reverend Jesse L. Jackson* (visited Feb. 18, 2000) <<http://www.usbol.com/ctjournal/JJacksonbio.html>>. Jesse Jackson is the President of the National Rainbow Coalition, and is one of the most prominent political figures in the United States today. See *id.* The National Rainbow Coalition is an organization that Jackson founded in 1986. *Id.* The organization is devoted to "empowerment, education, and mobilization." See *id.* Jackson has played a major role in the movements "for empowerment, peace, civil rights, gender equality, and economic and social justice." *Id.* In 1988, Jackson ran for President of the United States, and received about seven million votes. See *id.* In the process, two million people registered to vote. See *id.* As a youth, he served as a young organizer in the Southern Christian Leadership Conference working as Dr. Martin Luther King, Jr.'s assistant. See *id.*

104. See Kathy Walt, *A Touching Scene on Death Row* HOUS. CHRON., Apr. 9, 1998, at A27.

105. See *id.*

106. See *id.*

107. See *id.*

108. See *id.*

109. Walt, *supra* note 104, at A27.

110. *Id.*

111. *Id.*

112. See *id.*; Telephone Interview with Rena Beazley, Mother of a Texas Death Row Inmate (Jan. 8, 2000) [hereinafter Interview with Rena Beazley].

ter was convicted of a serious felony.<sup>113</sup> Thus, it is possible that the Eighth Amendment ban against "cruel and unusual punishment" may be violated in the case of a child not being allowed to have contact with her mother. Importantly, it is not the inmate's constitutional rights that are being disregarded in Texas: rather, it is the constitutional rights of the family and close friends of death row inmates that are being infringed.<sup>114</sup> Therefore, it may be argued that Texas' policy becomes cruel and usual because it is punishing the innocent. Sympathy for death row inmates in Texas regarding visitation rights is probably not extraordinarily high. However, prohibiting contact visits strips innocent family members (and attorneys for that matter) from important contact with their loved one.<sup>115</sup> The non-contact policy seemingly punishes innocent visitors of a death row inmate. An Eighth Amendment claim becomes more practical when one takes into account that there are at least six states that allow full contact visits between death row inmates and their family members.<sup>116</sup>

By not allowing basic human contact to innocent family members, the State of Texas is not only violating the Eighth Amendment, but is also disintegrating the nuclear family. Mumia Abu-Jamal,<sup>117</sup> who is probably

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113. See Caryl Clarke, *Prisons Rethink Policies for Visits: The Alleged Rape of a Pre-Teen Girl by an Inmate Creates Serious Concern Among Prison Officials*, YORK DAILY REC., Apr. 3, 1999, at A1 (writing about death row procedures in Pennsylvania, and how they affect family members of the inmates). In Pennsylvania, those with family members in the general prison population are allowed contact visits with their loved ones. *See id.* The state feels that an abolition of contact visits would "punish the families." *Id.* A spokesperson for the Pennsylvania Department of Corrections said it was "a problem" for families to have a family member in prison, and that they encourage the practice of family members "to be able to hug their person hello and hug them goodbye." *Id.* The Pennsylvania policy, however, does not apply to its death row population. *See id.*

114. Family members believe their constitutional rights are infringed because they view the no-contact policy as punishment – punishment for a crime they did not commit. *See* Telephone Interview with Rena Beazley, *supra* note 112.

115. *See generally* Caryl Clarke, *supra* note 113. (acknowledging that no-contact visits for inmates in the general prison population would punish families).

116. *See* Bob Klose, *North Bay Planners Covet San Quentin Site: Officials Discuss Ferry, Rail Port on Prime Real Estate*, PRESS DEMOCRAT, June 27, 1999, at A1.

117. *See* Cathy Burke, *High Court Rejects Appeal by Death-Row Cop-Killer Mumia*, N.Y. POST, Oct. 5, 1999, at 16 (noting that Mumia Abu-Jamal was sentenced to death for the murder of a police officer). Mumia Abu-Jamal was an award-winning freelance reporter for Philadelphia radio stations in the 1970's. *See* Free Mumia-East Bay, *Who is Mumia Abu-Jamal?* (visited Feb. 23, 2000) <<http://www.aspenlinx.com/mumia/About-Mumia.htm>>. Abu-Jamal was monitored by the FBI as a teenager for his involvement in the Black Panther Party. *See id.* Mumia Abu-Jamal built his reputation as a journalist exposing Philadelphia police practices of racism and brutality. *See id.* In 1982, Abu-Jamal was convicted and sentenced for the murder of a Philadelphia police officer. *See id.* Many, including Abu-Jamal, have claimed the former Panther was set up as a means to silence his sharp criticism of the police and elected officials. *See id.* On the first day of the 1999-2000 session, the Supreme Court rejected the appeal of Mumia Abu-Jamal without comment,

the most widely known death row inmate in America, has described the effect of prison policies that only allow non-contact visits as weakening, and finally destroying family ties.<sup>118</sup>

The opposing view, that of the State of Texas, is one that is diametrically contrary to that of Abu-Jamal, Jackson, and other abolitionists. Conservative penologists argue that once a person is sent to death row, they no longer have the right to liberties such as contact visits with their family and friends.<sup>119</sup> Two primary reasons historically used for restricting contact visits on death row are: 1) death row inmates are in prison to be punished, and 2) contact visitation would pose a real security threat to prison officials.<sup>120</sup> The punishment argument will be dealt with first, followed by concerns about security.

#### A. *Punishment as a Reason for Restriction*

Theoretically, two criminal defendants could commit the same crime, and one jury might decide to give one of the individuals a death sentence, while the other receives a lighter sentence from a more progressive jury in another part of the state. The inmate who has an execution date will be punished more so due to the disadvantage of being allowed only non-contact visits. Meanwhile, the inmate sentenced to life may find himself in one of the state prisons which allows for contact visitation. Such a case illustrates the conundrum the Texas system has established by implementing the rules of the current system.

Texas' official stance is that punishment is not a reason for the lack of contact visits on death row.<sup>121</sup> Outside of death row, inmates in the general population are ordinarily allowed contact visitation, unless they are placed in administrative segregation.<sup>122</sup> An inmate in the general population may be placed in administrative segregation if he is disruptive or

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thus exhausting Abu-Jamal's state appeals. *See id.*; Robert Kilborn & Lance Carden, *USA, CHRISTIAN SCI. MONITOR*, Oct. 5, 1999, at 20; Linda Greenhouse, *Supreme Court Roundup*, N.Y. TIMES, Oct. 5, 1999, at A20.

118. *See* Mumia Abu-Jamal, *LIVE FROM DEATH ROW* 11-12 (1995); Daniel Blank, Book Note, *Mumia Abu-Jamal and the "Death Row Phenomenon"*, 48 *STAN. L. REV.* 1625, 1648 (1996) (reviewing *MUMIA ABU JAMAL, LIVE FROM DEATH ROW* (1995)) (quoting Mumia Abu-Jamal on his beliefs about the way the state attempts to weaken death row inmates in order to better prepare everyone for execution).

119. *See* Telephone Interview with Larry Fitzgerald, *supra* note 16 (construing the state's policy as one that is only concerned with security, while still admitting that death row inmates are the only inmates in Texas prisons that are automatically denied contact visits).

120. *See id.* (professing his concern that contact visits for death row inmates increases the chance of contraband being passed between visitors and inmates).

121. *See id.*

122. *See id.*

involved in a prison gang.<sup>123</sup> In contrast, death row inmates are immediately placed in administrative segregation upon arriving on death row.<sup>124</sup>

Death row inmates in Texas are all in prison for a conviction of capital murder.<sup>125</sup> However, the time spent in prison basically amounts to a "waiting period" before an inmate is put to death.<sup>126</sup> A similar "waiting period" occurs in other areas of the prison system, including all other correctional facilities in Texas apart from death row. However, those inmates not on death row can usually be comforted by the knowledge that they will one day be released. Death row inmates obviously do not have the opportunity of being released. This "waiting period" for death row inmates takes place in administrative segregation within a maximum-security prison.<sup>127</sup> Maximum-security prisons are known to be a severe form of punishment.<sup>128</sup> In Texas, the severe punishment experienced in a maximum-security prison is enhanced by the prospect of one day being put to death in the Walls Unit.<sup>129</sup> Punishment on death row is heightened by the restriction of contact visits to inmates.<sup>130</sup>

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123. See *id.* (indicating the factors considered before an inmate is placed in administrative segregation in Texas).

124. See *id.*

125. See TEX. PEN CODE ANN. § 19.03(a)(1)-(8) (Vernon 1999) (listing crimes in Texas which are considered capital offenses). A capital offense in Texas is characterized as murder of a public safety officer, firefighter, or correctional employee; murder during the commission or attempted commission of specified felonies (kidnapping, burglary, robbery, arson, aggravated rape, obstruction or retaliation); murder for remuneration; multiple murders; murder during prison escape; murder by a state prison inmate who is serving a life sentence of any of five offenses; or murder of an individual under six years of age. See *id.*

126. See Linda Greenhouse, *Court's Refusal to Hear Cases Preserves Delays on Death Row*, N.Y. TIMES, Nov. 9, 1999, at A1 (proclaiming that the Supreme Court had denied certiorari for two death row inmates who complained that their "waiting time" spent on death row before being executed amounted to cruel and unusual punishment).

127. See Telephone Interview with Larry Fitzgerald, *supra* note 16.

128. Texas is currently in the process of moving its death row population from the Ellis Unit in Huntsville to what is believed to be the more secure Terrell Unit in Livingston. See John Moritz, *Death Row Inmates Will be Moved to Terrell Unit; Security Seen as Tighter than at Ellis*, FORT WORTH STAR-TELEGRAM, June 9, 1999, at 1 (asserting that the Terrell Unit has no television or radios, and daily recreation will be for an hour or two each day in solitude). The rest of an inmate's time is spent in single person cells behind solid steel doors in six-by-ten-foot cells. See *id.*

129. See David R. Dow, *The State, the Death Penalty and Carl Johnson*, 37 B.C. L. REV. 691, 711 (1996) (explaining that executions in Texas take place at the Walls Unit between 6p.m. and midnight); see also Steve Russell, *The Legacy of Thurgood Marshall in Strawberry Season*, 23 T. MARSHALL. L. REV. 19, 43 n.114 (1997) (indicating the Walls Unit, located in downtown Huntsville, Texas, is where both female and male Texan inmates are executed).

130. See Interview with Napoleon Beazley, *supra* note 4. (discussing the punishing pain of not being able to have contact with his family).

Generally, the Texas Department of Criminal Justice provides for one visit a week for inmates.<sup>131</sup> Although all inmates confined by the Texas Department of Criminal Justice are being punished, in most Texas prisons, contact visits are allowed.<sup>132</sup> These prison policies are subject to the possibility of an inmate being placed in administrative segregation, which effectively terminates contact visits for that inmate.<sup>133</sup>

Death row inmates are already facing the ultimate punishment of execution, but they are still being punished during the "waiting period" more than other inmates in the criminal justice system. Because of this inconsistency within the prison population itself, Texas' policy might be in violation of a death row inmate's right to Equal Protection as provided by the Constitution.<sup>134</sup> Death row inmates are still prisoners under the supervision of the state, and an Equal Protection claim serves to challenge Texas' unequal treatment of death row inmates and their families.

Although the harsh punishment rationale is not the official position of the Texas Department of Criminal Justice, it seems to be an underlying factor, and also raises a peculiar concern. The rationale is odd primarily due to policies in other Texas prisons which allow for contact visitation. If everyone in prison is there to be punished, then a hypocritical situation currently exists in Texas' prisons.<sup>135</sup> In all other areas of the prison sys-

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131. See Interview with Larry Fitzgerald, *supra* note 16.

132. See *id.* (explaining that inmates in the general population are allowed contact visits unless they are placed in administrative segregation, which prohibits an inmate from contact visitation); see also Texas Department of Criminal Justice, *General Information Guide for Families of Offenders* (visited Feb. 19, 2000) <[http://www.tdcj.state.tx.us/publications/offender\\_family\\_guide/offguide-visit.html](http://www.tdcj.state.tx.us/publications/offender_family_guide/offguide-visit.html)> (providing information about Texas' visitation procedures). The Texas Department of Criminal Justice provides for limited physical contact between eligible offenders and their visitors. See *id.* Limited contact is allowed if the visitors are "immediate family (natural parents, stepparents or grandparents; natural or adopted children, stepchildren or grandchildren; natural siblings or stepsiblings; spouse; or persons related by marriage, if accompanied by an immediate family member)". See *id.* In addition, facility administration may allow non-immediate family members to visit, with prior approval, if immediate family members cannot visit the offender. See *id.*

133. See Interview with Larry Fitzgerald, *supra* note 16 (citing the fact that an inmate is treated differently in what is commonly referred to within the prisons as "ad seg").

134. See, e.g., *Williams v. Lane*, 851 F.2d 867, 881-82 (7th Cir. 1988) (ruling that inmate's equal protection rights were violated when programs and living conditions for protective custody inmates were unequal in comparison to the general population and not justified by security concerns).

135. Equal Protection challenges which question the punishment of inmates in an unequal manner have a long history of litigation in this country. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) (citing *Lee v. Washington*, 390 U.S. 333 (1968) that inmates' Equal Protection rights were violated if a prison discriminated based on race); *Williams v. Meese*, 926 F.2d 994, 998 (10th Cir. 1991) (deciding that the Fifth Amendment is violated if prison officials discriminate based on age, handicap, or race in deciding which jobs to assign inmates); *Doe v. Sparks*, 733 F. Supp. 227, 232-33 (W.D. Pa. 1990) (pronouncing that

tem in Texas, a prisoner must basically "earn their way" into a situation whereby contact visits are seized from them.<sup>136</sup> Contradictorily, death row inmates are automatically placed in administrative segregation, no matter how they behave in prison.<sup>137</sup> Texas' death row population is thoroughly being punished for their prior actions.<sup>138</sup> This punishment should not be exaggerated by automatically denying death row inmates contact visitation. Texas prison officials should re-examine the actual reasons for denying this basic necessity.

### B. *Security as a Reason for the Restriction*

In addition to the need for punishment, security related issues have also been voiced as a reason for keeping family members from having contact with death row inmates.<sup>139</sup> In the minds of Texas criminal justice officials, security related issues, such as the smuggling of contraband into the prison, might become prevalent if family members were allowed to have contact visits with their loved one.<sup>140</sup> In fact, security concerns are the only rationale under which contact visits may constitutionally be withheld.<sup>141</sup> In *Block v. Rutherford*,<sup>142</sup> the Supreme Court of the United States ruled a ban on contact visits to be constitutional on the ground that responsible, experienced executives had decided in their own discretion that contact visits would endanger the security of the prison.<sup>143</sup> The *Block* Court added that the regulation was reasonably related to legitimate security concerns.<sup>144</sup> The Supreme Court in *Block* declared that

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prison visitation policy which excludes homosexuals has no rational relationship to any legitimate government objective, and therefore violates male homosexual inmates' Equal Protection rights).

136. See Interview with Larry Fitzgerald, *supra* note 16 (illustrating how an inmates in the general prison population violates rules warranting them to be placed in administrative segregation).

137. See *id.* (affirming the rules Texas has enacted on death row with regard to administrative segregation).

138. See *id.* (acknowledging that the capital punishment inflicted on death row inmates in Texas is the ultimate form of punishment).

139. See *id.*

140. See *id.* (expressing concerns of possible security breaches if contact visits on death row were allowed).

141. See *Block v. Rutherford*, 468 U.S. 576, 584-85 (1984) (reaffirming the restricted capacity courts should have in prison administration).

142. 468 U.S. 576 (1984).

143. See *id.* at 589 (authorizing prison officials to develop their own policies in regard to contact visits).

144. See *id.* at 589, 591 (declaring that the regulation in question passed the basic constitutional test in order for it to be valid).

reasonable relation to security concerns was obvious and the prisoner's claim did not warrant an 'extended discussion.'<sup>145</sup>

Security, being a legitimate concern of Texas prison officials, feasibly may be breached in a variety of different ways. The manner that seems most apparent by the *Block* decision is the smuggling of weapons, drugs, or other contraband into the possession of the inmate.<sup>146</sup> Yet, security concerns currently exist in every correctional facility in the country. If security concerns are sufficiently dealt with in other states that have death row populations, then it becomes an enigma as to why Texas perceives it as such a colossal problem. This issue now seems sufficiently ripe to warrant an "extended discussion,"<sup>147</sup> especially as to why there are differing policies in different states.

California is one state that employs a contact visit policy that exposes the irrationality of the Texas system.<sup>148</sup> California has the largest death row population of any state in the country.<sup>149</sup> As of September 1, 1999, California had one hundred more death row inmates than Texas.<sup>150</sup> Yet, even with an arguably higher risk of possible security breach due to the old age of the facility, California allows full contact visits for death row inmates.<sup>151</sup> Interestingly, California's death row is located at San Quentin, which is over 145 years old.<sup>152</sup> In contrast, Texas currently has plans

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145. *See id.* at 586. In Justice Burger's decision he claimed that "contact visits" invite a host of security concerns. *See id.* They may open the institution to the introduction of drugs, weapons and other contraband. *See id.* Justice Burger's opinion stated visitors could "easily conceal guns, knives, drugs, or other contraband in countless ways, and pass them to an inmate unnoticed." *See id.*

146. *See id.* at 586.

147. *See id.*

148. *See generally* Bob Klose, *supra* note 116, at A1. (naming California's death row as one which allows for contact visits between death row inmates and their family).

149. In 1996, the states with the highest number of death row inmates were California, Texas, and Florida. *See* Randall Coyne & Lyn Entzerroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3, 13 (1996); Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only "The Appearance of Justice"?*, 87 J. CRIM. L. & CRIMINOLOGY 130, 170 (1996).

150. *See Death Row Inmates by State*, *supra* note 21. (indicating a chart which shows California's September 1, 1999 death row population at 551 and Texas' at 458).

151. *See* Bob Klose, *supra* note 116, at A1 (reporting on a situation involving life on death row in California). Charla Greene is a member of Abolition Road, an organization which supports inmates, located in California. *See id.* After witnessing the positive effects of California's policy on contact visits, Greene is convinced that families deserve contact visits with their death row inmates. *See id.* "You see families hugging and having family talk. These people deserve their family visits just as much as anyone else," Greene said. *Id.*

152. *See id.*

to move all of its death row population to a newer, more secure unit in East Texas.<sup>153</sup> Amazingly, California's larger and older death row continues to allow contact visits.<sup>154</sup>

Texas' death row inmate policy seems to violate basic standards of decency by being inconsistently harsher than other states faced with the same predicament.<sup>155</sup> Thus, relying on security concerns as the basis for the non-contact policy is rebutted by the rules governing contact visitation in California. In short, Texas has no equitable counterpart to California's more progressive answer to an identical situation.

### 1. Security vs. Family Unity

In the case of contact visits for death row inmates in Texas, security concerns should strike a balance with society's concerns for family unity.<sup>156</sup> The state has long recognized a need to preserve the nuclear family to the extent possible.<sup>157</sup> America's philosophy on immigration, for example, stresses the importance of keeping immediate family mem-

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153. The State of Texas is in the process of moving all of its male death row population to the Terrell Unit in Livingston, Texas. See Mike Ward, *Prison Officials Propose Limits to Interviews on Death Row*, AUSTIN-AM. STATESMAN, June 9, 1999, at B1 (announcing the change in facilities for the male population on death row); see also John Moritz, *supra* note 128, at 1. The state plans more rigid rules at the new facility: no television sets, limited (if any) radio access, 22-23 hours a day of solitary confinement in six-by-ten cells with no air-conditioning, and solitary recreation time. See *id.* TDCJ spokesman Larry Todd proclaimed the new death row home is a step in the right direction, 'This is not an amusement park, it's not a movie set. It's a maximum-security prison where killers live', said Todd. See *id.*

154. See Bob Klose, *supra* note 116, at A1.

155. For example, the four states that geographically surround Texas, all allow contact visits. See Ron Coulter, et al., *State Contact Visitation Policies for Death Rows in the United States: Presentation Materials for the 1998 Idaho Legislature (1998)* (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (confirming that Arkansas, Louisiana, Oklahoma, and New Mexico all allow for at least some form of contact visitation for death row inmates).

156. See Interview with Rena Beazley, *supra* note 112. (relating the fact that contact visits would be a positive for her family).

157. See Elizabeth A. Hadad, Comment, *Tradition and the Liberty Interest: Circumscribing the Rights of the Natural Father: Michael H. v. Gerald D.*, 56 BROOKLYN L. REV. 291, 321 (1990) (advancing the sentiment that the state's interest in protecting the nuclear family and its capacities has always been a part of the country's history and established constitutional interpretation); Kelly Rowe, Comment, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated*, 34 EMORY L.J. 855, 876 (1985) (arguing that the family is the basic unit in American society which must be preserved if the order of society is to persist to function, and that state encouragement of the family has been supported by the Supreme Court).



bers together.<sup>158</sup> This importance is evident in the federal government's policy of allowing for an unlimited amount of immediate family members of American citizens to immigrate into the country each year.<sup>159</sup> For better or worse, "family values" are important to the American legal and political system.<sup>160</sup> If the state of Texas is truly concerned with "family values," then it should not discourage familial contact for families of death row inmates.

When the state does not allow contact visits for death row inmates, it truly punishes the inmate's family. The family of the inmate has not been convicted of the inmate's crime, but they are punished when it comes to family contact.<sup>161</sup> Traditional legal and political "family values" also appear to be violated by Texas' policy. Traditionally, the rules that govern society inevitably take into account morality,<sup>162</sup> but it seems Texas' policy only pretends to address greater societal values. Texas acts in a manner which suggests that family values are no longer important once an inmate goes to death row. In reality, family ties last throughout a lifetime.

## 2. Security Concerns and "Last Hugs"

Even if regular contact visits jeopardize the security of death row, the practice of forbidding "last hugs" to family members of the condemned

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158. See Rep. Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reasons*, 28 ST. MARY'S L.J. 883, 892 (1997) (urging that, even in the minds of these conservative writers, any type of immigration reform that supports the preservation of the nuclear family is important and should be defended).

159. See H.R. REP. NO. 99-906 (1986) (stressing that the U.S. Immigration policy has supported the preservation of the nuclear family by permitting immediate family members of U.S. citizens to immigrate to the United States without quotas).

160. See generally Margaret A. Baldwin, *Public Women and the Feminist State*, 20 HARV. WOMEN'S L.J. 47, 109 (1997) (acknowledging that not everyone's construct of "family values" is the same). The traditional conservative construction of "family values" seems to be violated when parents cut off contact with their children. In other words, family values appear to be abandoned when a parent consciously disregards their duties to provide love, emotional and physical contact, and support. Thus, it seems the state of Texas is violating traditional family values by discouraging family contact when the family is faced with a tumultuous situation.

161. See Interview with Rena Beazley, *supra* note 112. (discussing how the punishment by the Texas Department of Criminal Justice affects her family); see also Interview with Napoleon Beazley, *supra* note 4.

162. See, e.g., James Joseph Duane, *What Message Are We Sending to Criminal Jurors When We Ask Them to "Send a Message" with Their Verdict?*, 22 AM. J. CRIM. L. 565, 597-98 (1995) (arguing that the decisions and punishment handed down by criminal juries should be by people who fairly represent the morality of the society because these decisions are reflections in community morality); Robert F. Schopp, *Wake Up and Die Right: The Rationale, Standard, and Jurisprudential Significance of the Competency to Face Execution Requirement*, 51 LA. L. REV. 995, 1012 (1991) (claiming that the criminal law serves to prevent crime by incorporating conventional social morality).

remains a serious puzzle. Security concerns, such as the smuggling of drugs or weapons, is no longer a concern in visits immediately preceding executions.<sup>163</sup> Even when one accounts for the small chance that the inmate's family will actually be successful at smuggling contraband to their loved one, it would not matter because in a few hours the inmate would be dead. The Texas custom of not allowing contact visits immediately before an execution does not flow logically from any public policy concern.<sup>164</sup> Security, which is no longer a concern a few hours before an inmate's execution, does not serve as a valid excuse for Texas' "no last hug" policy.<sup>165</sup> With security no longer a legitimate reason for Texas' contact visit policy, punishment appears to be the only feasible reason for not allowing a family member a "last hug" before their son, daughter, mother, or father is executed. However, is not the State of Texas, a few hours before putting an inmate permanently to sleep, on the doorstep of completing the most supreme form of punishment.<sup>166</sup> In the final hours before an execution, allowing a family member a "last hug" outweighs any final interest or effort to punish a death row inmate one last time.<sup>167</sup> Texas officials should re-examine a policy that does not allow for a mother to hug her son or daughter one last time before he or she is executed.

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163. See Interview with Larry Fitzgerald, *supra* note 16.

164. See generally *id.* (corroborating the fact that security becomes a lesser concern immediately before an execution, and that punishment is never an objective of the T.D.C.J. in regard to contact visitation with death row inmates).

165. See generally *id.* (using conflicting language in claiming that security is less of a concern before an execution, but that inmates are not allowed any contact with their family or attorney).

166. See Richard Lowell Nygaard, *On Death as a Punishment*, 57 U. PITT. L. REV. 825, 826 (1996) (labeling capital punishment as the most absolute sanction of punishment due to its drastic and irreversible consequences); Geraldine Szott Moohr, Note, *Murray v. Giarratano: A Remedy Reduced to a Meaningless Ritual*, 39 AM. U. L. REV. 765, 779 (1990) (reviewing the Supreme Court's decision in *Furman* in which they declared the death penalty society's utmost punishment); see also Anthony Neddo, Comment, *Prosecutorial Discretion in Charging the Death Penalty: Opening the Doors to Arbitrary Decisionmaking in New York Capital Cases*, 60 ALB. L. REV. 1949, 1982 (1997) (proposing that the prosecutor is in charge with the decision of implementing the ultimate form of punishment); Ramona J. Cunningham, *Qualifying Jurors in Capital Trials: Are Sixth Amendment Rights Adequately Protected in North Carolina?*, 62 N.C. L. REV. 1213, 1220 (1984) (detailing a juror's decision of imposing life or death as the ultimate determination).

167. See Interview with Rena Beazley, *supra* note 112. (concluding that before an execution, the punishment should not extend itself to the inmate's family, thus allowing loved ones a "last hug").

## IV. REGULAR CONTACT VISITS FOR ATTORNEYS

The Fourteenth Amendment guarantees "meaningful access to the courts."<sup>168</sup> There have been many cases that have attempted to define what "meaningful access to the courts" means.<sup>169</sup> At least two federal courts of appeals have deemed physical contact with one's attorney in the capital appellate process as being "meaningful access to the courts."<sup>170</sup>

In *Mann v. Reynolds*,<sup>171</sup> the Tenth Circuit ruled that contact visitation for attorneys and their death row inmate clients was essential to ensure "meaningful access to the courts."<sup>172</sup> On May 21, 1992, Anthony Mann, along with other death row inmates, filed a civil action pursuant to 42 U.S.C. § 1983 seeking judicial relief from prison policies that prohibited contact visits between an attorney and an inmate.<sup>173</sup> The Plaintiffs claimed that an Oklahoma State Penitentiary (OSP) policy prohibiting barrier-free contact visits between inmates, health professionals and legal counsel violated the inmates' Sixth and Fourteenth Amendment rights.<sup>174</sup> The district court held that changes adopted by OSP which liberalized the prison policy during the course of the litigation, were "in compliance with constitutional requirements."<sup>175</sup> The district court ruled that non-contact visitation amongst attorneys and death row inmates infringes upon the Sixth and Fourteenth Amendments of the United States Constitution.<sup>176</sup> The Court of Appeals in the Tenth Circuit reviewed the case in 1995, and affirmed the district court's decision regarding contact visitation and the

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168. See *Bounds v. Smith*, 430 U.S. 817, 822 (1977) (ruling that due process demands that all inmates should have "meaningful access to the courts"); *Jackson v. Procunier*, 789 F.2d 307, 311 (5th Cir. 1986).

169. See, e.g., *Bounds*, 430 U.S. at 828 (describing the right to "meaningful access to the courts" broadly to include providing assistance to inmates in preparing legal documents, providing an adequate law library within the prison facility, or allowing inmates access to legal counsel); *Jackson*, 789 F.2d at 311 (providing one example which notes that tampering with legal mail of a prisoner qualifies as denying "meaningful access to the courts").

170. See *Mann v. Reynolds*, 46 F.3d 1055, 1061 (10th Cir. 1995) (providing that since the state offered no viable justifications for the Oklahoma State Penitentiary's policy of disallowing contact visits between the inmates and their attorneys, the policy violated the prisoner's right of access to the courts); *Ching v. Lewis*, 895 F.2d 608, 610 (9th Cir. 1990) (per curiam).

171. 46 F.3d 1055 (10th Cir. 1995).

172. See *id.* at 1061.

173. See *Mann v. Reynolds*, 828 F. Supp. 894, 896 (W.D. Okla. 1993), *overruled by* 46 F.3d 1055 (10th Cir. 1995).

174. See *Mann*, 46 F.3d at 1056.

175. *Id.*

176. See *Mann*, 828 F. Supp. at 907, *overruled by* 46 F.3d 1055 (10th Cir. 1995).

right to counsel.<sup>177</sup> The Tenth Circuit's decision can be interpreted to mean that contact visitation between a death row inmate and his attorney is essential for effective representation of counsel.<sup>178</sup>

Furthermore, additional case law supports the Tenth Circuit's decision in *Mann*. In *Ching v. Lewis*,<sup>179</sup> the Ninth Circuit reversed summary judgment granted in favor of prison officials because they fell short of giving any justification for their decision to prohibit contact visits to the inmates in the prison.<sup>180</sup> The Ninth Circuit postulated this decision based on the analysis in *Dreher v. Sielaff*.<sup>181</sup> *Dreher* recognized that prison administrators are granted deference in developing procedures designed to maintain internal order,<sup>182</sup> but also ruled that policies will not be upheld if they unnecessarily abridge the defendant's meaningful access to his attorney and the courts.<sup>183</sup> "The opportunity to communicate privately with an attorney is an important part of that meaningful access".<sup>184</sup> The Ninth Circuit in *Ching* went on to hold that an inmate's privilege to access the courts included contact visitation with counsel.<sup>185</sup>

The Supreme Court of the United States has given courts some guidance in determining whether a non-contact visitation policy violates a constitutional protection. In *Turner v. Safley*,<sup>186</sup> the Supreme Court laid out guidelines that federal courts should examine when determining whether a prisoner's rights have been violated.<sup>187</sup> The four applicable factors the Court set out to guide federal courts in this determination are: (1) whether a "valid, rational connection" exists between the prison policy and the "legitimate governmental interest put forward to justify it";

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177. See *Mann*, 46 F.3d at 1061 (affirming the specific portion of the district court decision dealing with the right to contact visitation in reference to attorneys).

178. See *id.*

179. *Ching*, 895 F.2d at 608.

180. *Ching*, 895 F.2d at 610; see also *Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994) (per curiam) (ruling that prison officials, in this later 9th circuit case, again failed to make a showing of being 'reasonably related to legitimate penological interests' in regard to a non-contact visitation policy between inmates and their attorneys).

181. *Dreher v. Sielaff*, 636 F.2d 1141 (7th Cir. 1980).

182. See *id.* at 1145-46.

183. *Id.* at 1146.

184. *Ching*, 895 F.2d at 609.

185. See *Ching*, 895 F.2d at 610; see also *Casey v. Lewis*, 4 F.3d 1516 (9th Cir. 1993). *Casey* is a more current Ninth Circuit decision that weakened the court's prior decision in *Ching*. The Ninth Circuit ruled that the prisoner bears the burden of establishing the unreasonableness of the challenged regulation. See *id.* at 1519. The court in *Casey* went on to decide that a well-stocked law library might substitute for attorney-prisoner contact visitation. See *id.* at 1522. The Ninth Circuit's decision is curious because it installs vast ambiguity into exactly what "a prisoner's access to the courts" constitutes.

186. *Turner v. Safley*, 482 U.S. 78 (1987).

187. See *Turner*, 482 U.S. at 89-91.

(2) if alternative means of exercising that right exist; (3) what the impact accommodation of the constitutional right will have on guards, on other inmates, and on the allocation of prison resources; and (4) whether the regulation or policy is an exaggerated response to prison concerns.<sup>188</sup>

Although the *Turner* analysis applies generally to prisoners' rights being violated, the factors presented by the Court should be applied to the specific issue of attorney contact visitation. In a case involving a possible disregard of an inmate's constitutional rights by prison officials, a federal court has the burden of deciding whether the policy is "reasonably related to a legitimate penological" objective.<sup>189</sup> The prison's objective should also be examined to determine whether it represents an exaggerated response to those concerns.<sup>190</sup>

With respect to the situation in Texas, the *Turner* analysis becomes critical to the determination of whether death row inmate's constitutional rights are being violated by the current no-contact visitation policy. The first factor of the *Turner* test, which attempts to strike a balance between governmental interest and prison policy, is most likely satisfied in the State of Texas. In other words, prison security is a legitimate governmental interest.<sup>191</sup> However the second prong of the test, regarding alternative methods, begins to raise doubts about the non-contact visitation procedure. It appears there exist less rigid or restrictive methods of insuring prison security in Texas besides the unyielding policy currently in force.<sup>192</sup> A policy which allows for a breach of security to occur before contact privileges are terminated may serve as an alternative method for the state to explore in this specific situation.

The third, or "impact," prong of the *Turner* test requires speculation as to what the result would be if contact visitation were to be implemented.<sup>193</sup> While dissecting this third component of the test, courts must take into account the immense amount of money the State of Texas spends on correctional facility management.<sup>194</sup> Any new financial bur-

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188. *Id.*

189. *Id.* at 89.

190. *See id.* at 87 (defining what the court's role is in determining whether there is a legitimate cause of action).

191. *See* Interview with Larry Fitzgerald, *supra* note 16. (urging that security is of the utmost concern for the state in regard to death row policies).

192. *See id.* (suggesting that in other areas of the prison system in Texas, inmates must engage in some sort of unfavorable manner in order for contact visitation privileges to be taken away). This is in contrast to the uncompromising policy in effect on death row. *See id.*

193. *See Turner*, 482 U.S. at 90.

194. *See* Texas Department of Criminal Justice, *Financial Services Division: Appropriations by Goal-Fiscal Year 2000* (visited Feb. 19, 2000) <<http://www.tdcj.state.tx.us/finance/budget/finbud-goal.htm>> [hereinafter *Appropriations by Goal-Fiscal Year 2000*] (proposing

dens placed upon the State of Texas after a contact visitation policy is implemented may be offset by the large allocation of state money given to correctional facilities each year.<sup>195</sup> The money used in this area could help guarantee a hassle-free transition to a contact visitation policy.<sup>196</sup> Texas seems perfectly willing to spend the money to keep its prisons and prison employees secure.<sup>197</sup> Currently existing state money may also be used to insure that constitutional guarantees of Texas inmates are not infringed upon.<sup>198</sup>

Probably the most glaring hole in the rationale for Texas' non-contact visitation policy becomes evident when one examines the fourth factor to be taken into account in the *Turner* test. Texas' extreme response to security concerns seems to be overly exaggerated.<sup>199</sup> Texas has established a system which allows for absolutely no contact visitation between a death row inmate and his or her attorney.<sup>200</sup>

In addition to case law analysis which points in favor of contact visitation for death row inmates and their attorneys in Texas, cultural reasons should also be considered. Proxemics is the field of study concerned with how individuals communicate through utilizing interpersonal space and distance.<sup>201</sup> Essentially, spatial relationships are a fundamental component of the communication process.<sup>202</sup> Sometimes proxemics set the tone of interaction and overpower the actual words spoken.<sup>203</sup> Those cultures displaying a considerable or substantial amount of interpersonal closeness can be labeled "contact cultures" because individuals demonstrate

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that T.D.C.J. will spend over 79% of its allocated budgetary money on incarcerating felons).

195. See *id.* (announcing that the total appropriations from the state of Texas to the T.D.C.J. in 2000 is \$2,315,748,901).

196. See generally Thomas K. Landry, "Punishment" and the Eighth Amendment, 57 OHIO ST. L.J. 1607, 1649 (1996) (insinuating that if a prison desired to save money, prison security would be endangered). The logical inverse to this premise is that if more money is spent, prison security is enhanced.

197. See generally *Unit Profiles: Ellis*, *supra* note 9; *Appropriations by Goal - Fiscal Year 2000*, *supra* note 194. It can be inferred the \$79,945,631.00 appropriated for Indirect Administration at the Ellis Unit is to keep prisoners and prison employees secured.

198. See *Appropriations by Goal-Fiscal Year 2000*, *supra* note 194. (revealing the budget of the criminal justice system to be over two billion dollars).

199. See *Turner v. Safley*, 482 U.S. 78, 87 (1987) (referring to the "exaggerated" language in the decision).

200. See Interview with Larry Fitzgerald, *supra* note 16. (summarizing the state's absolute no-contact visitation policy, and how it influences attorneys).

201. See Julie Barker, *International Mediation - A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in an International Commercial Mediation with Mexicans*, 19 LOY. L.A. INT'L & COMP. L.J. 1, 38 (1996).

202. See *id.*

203. See *id.*

more expression in regard to their bodies.<sup>204</sup> People from these cultures orally converse at close distances with a significant amount of physical contact.<sup>205</sup> In "contact cultures," the use of physical contact is indicative of confidence and trust.<sup>206</sup>

An attorney from a "contact culture" may find that physical contact is an essential aspect of developing a candid relationship with his client. The inverse may be true for a death row inmate from a "contact culture". With the addition of contact in his or her relationship with an attorney, a death row inmate may be able to place a greater degree of trust with his or her lawyer; thus making for enhanced legal representation. The many different cultures found on death row should be considered when the state administers its prison policies. Some cultures rely on contact within communication as a means of gaining faith and assurance in one another.<sup>207</sup> If Texas is truly concerned with providing meaningful access to the courts<sup>208</sup> for inmates of all cultures, it should implement a contact visitation policy for attorneys and their clients on death row.

#### A. *Idaho's Solution and How Texas is Affected*

Notwithstanding the *Turner* test and cultural concerns, Texas' policy truly comes into question when it is compared to other states that practice capital punishment. For instance, the state of Idaho, during the 1998 and 1999 legislative session, modernized its law with regard to contact visitation between a death row inmate and his or her attorney.<sup>209</sup> House Bill Number 265 (HB 265) changed the law in Idaho to include contact visitation for an attorney and her client on death row.<sup>210</sup> As part of HB 265, the Idaho Legislature proclaimed that providing lawyers with access to their clients on death row is indispensable if an inmate is to achieve an equitable and adequate defense.<sup>211</sup> Idaho's legislature went on in HB 265 to acknowledge the fact that prison security is a primary concern of the state's correctional facilities.<sup>212</sup> The purpose of the new legislation,

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204. *See id.*

205. *See id.*

206. *See id.* at 39 (using Mexico as an example of a contact culture).

207. *See Barker, supra* note 201, at 39 (declaring that physical contact is a sign of trust in Mexico).

208. *Bounds v. Smith*, 430 U.S. 817, 822 (1977) (asserting restrictions prohibiting "adequate, effective, and meaningful" access to the courts have been struck down).

209. *See* H.B. 265, 55th Leg., 1st Reg. Sess. (Idaho 1999) (proposing contact visitation for attorneys of death row inmates in Idaho).

210. *See* IDAHO CODE § 19-2705 & 19-2706 (Michie Supp. 1999) (converting House Bill 265 into law in Idaho).

211. *See* H.B. 265, 55th Leg., 1st Reg. Sess. (Idaho 1999).

212. *See* H.B. 265, 55th Leg., 1st Reg. Sess. (Idaho 1999).

is to allow condemned prisoners to have contact visits with the attorney of record . . . subject to strict adherence with prison rules and subject to the authority of prison officials to suspend or deny visitation if the safe, secure, and orderly operation of the facility or the public safety could be compromised.<sup>213</sup>

It seems that Idaho has successfully balanced the interest of the possible violation of the attorney/client privilege and security concerns that the correctional facility may possess.

Unlike Idaho, Texas refuses to balance these interests. The same concerns raised in other states regarding the attorney/client privilege are seemingly not a concern in Texas. The prison rules in Texas do not clearly state the visitation policy regarding attorneys.<sup>214</sup> Subsection 6.7 of the rules dictates that "[r]ules for offender visits with attorneys shall be governed by the Attorney Visitation Rules established in the *Uniform Offender Access to Courts, Counsel and Public Officials Rules*."<sup>215</sup> Executive Directive 3.81 attempts to illustrate attorney/client visitation rules in Texas.<sup>216</sup>

Titled "Uniform Access to the Courts,"<sup>217</sup> the directive stops short of providing any explicit rules to govern attorney-client visits.<sup>218</sup> However, the policy does state that every inmate should have rightful access to the "State and Federal courts, to legal counsel, and to public officials and agencies."<sup>219</sup> The measure further states that every offender under the supervision of TDCJ should be assured access to attorneys.<sup>220</sup> Officers, employees or agents of the Texas prison system shall not punish or otherwise discipline any inmate as a consequence of the offender pursuing or achieving access to the courts.<sup>221</sup> Additionally, the policy states that an inmate's access to an attorney should be contingent on regulations of duration, place, and manner needed to maintain security and order in the

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213. Statement of Purpose, H.B. 265, 55th Leg., 1st Reg. Sess. (Idaho 1999).

214. See Ron Coulter, et. al., *State Contact Visitation Policies for Death Rows in the United States: Presentation Materials for the 1998 Idaho Legislature* (Texas Division) (1998) (unpublished manuscript, on file with *The Scholar: St. Mary's Law Review on Minority Issues*) [hereinafter Texas Division] (referring to Uniform Access to the Courts which only provides general provisions with regard to attorney visits and mentions nothing about contact visits).

215. See *id.*

216. See *id.*

217. See *id.*

218. See *id.* (rendering general and abstract information about an inmate's right to access of the courts).

219. *Id.*

220. See Texas Division, *supra* note 214.

221. See *id.*



prison.<sup>222</sup> Executive Directive 3.81, signed by Wayne Scott,<sup>223</sup> seems facially conscientious of the constitutional rights of inmates.<sup>224</sup> However, in practice the policy is extremely limited, as demonstrated by one appellate attorney in Texas who complained in frustration that "there is absolutely no contact between the condemned inmate and his attorney."<sup>225</sup>

The limitations placed on capital appellate attorneys in Texas becomes more curious when compared to other states. As part of the information that supported the effort to change the law in Idaho, researchers conducted a study of all death penalty states, and their prison policies in regard to contact visitation.<sup>226</sup> Not surprisingly, Texas ranked as one of the most rigid states in the Union regarding contact visitation between attorneys and their death row clients.<sup>227</sup> Ron Coulter,<sup>228</sup> an Idaho State Public Defender, together with other researchers in Idaho, found that a majority of the thirty-eight states that have death penalty statutes allow for some form of contact visitation.<sup>229</sup> The results from the research were taken before the legislature in 1998, and eventually convinced the largely Republican Idaho legislature to alter the death row visitation policy for attorneys.<sup>230</sup>

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222. *See id.*

223. *See* Ward, *supra* note 153, at A1 (declaring that the Executive Director of the Criminal Justice system in Texas is Wayne Scott and that he has 26 years of experience in the prison business).

224. *See* Interview with Walter Long, *supra* note 17 (implying that the seemingly scrupulous language of 3.81 is deflated when one realizes that Texas does not allow for private visitation between death row inmates and their attorneys).

225. Electronic Mail from Rita Radostitz, Criminal Defense Attorney (Aug. 12, 1999) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (remarking on current Texas death row policies). Rita Radostitz worked in Texas in the past doing appellate work on behalf of death row inmates. *See id.* She presently works in Oregon, but has vivid memories of the horrors she witnessed in the Texas system. *See id.* "It used to be that in the visiting room right next to the execution chamber, there was mesh on the cell door, but you could still touch the hands of your client through the mesh." *Id.* "When I went for my final visit with Richy Blackmon who was executed August 4th, they had replaced the mesh with a fine wire which made it impossible for even those millimeter of touch we used to be able to share." *Id.*

226. *See generally* Ron Coulter, *supra* note 155.

227. *See generally id.* (comparing death row visitation policies amongst the states that currently administer the death penalty).

228. *See* Electronic Mail from Ron Coulter, Idaho State Appellate Public Defender (Aug. 19, 1999) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (acknowledging that he is a public defender in Idaho, a state that worked to change the visitation policy in that state).

229. *See generally* Ron Coulter, *supra* note 155 (demonstrating statistical information about death row visitation policies in other states).

230. *See* State of Idaho, *House Membership* (visited Feb. 19, 2000) <<http://www.state.id.us/legislat/house.html>>. *See also* State of Idaho, *Senate Membership* (visited Feb. 19, 2000) <<http://www.state.id.us/legislat/senate.html>>.

According to the Idaho research, of the thirty-eight death penalty states, less than half, forbid contact visits between attorneys and death row inmates.<sup>231</sup> The states that do not allow for contact visitation are: Arizona, Colorado, California, Florida, Kansas, Maryland, Montana, Nevada, New York, North Carolina, Oregon, South Carolina, Tennessee, Texas, Virginia, and Washington.<sup>232</sup>

As part of the Idaho study, researchers determined whether "privacy areas for attorney visits" were available in each of the states.<sup>233</sup> Of the sixteen states which do not allow for contact visitation, only six do not allow for a private area for attorney-client visits.<sup>234</sup> Texas, Colorado, Kansas, Montana, New York, and South Carolina were the only six states that disallowed both contact and private visitations.<sup>235</sup> However, additional research has discovered more current information about the six states.<sup>236</sup> Currently, Colorado's policy consists of visits which take place between a glass partition.<sup>237</sup> A narrow "paper slot" allows attorneys and inmates to shake hands and pass documents.<sup>238</sup> Although Colorado's policy is far from ideal, it at least allows for some contact and privacy.

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231. See Ron Coulter, et al., *State Contact Visitation Policies for Death Rows in the United States: Presentation Materials for the 1998 Idaho Legislature (Introduction Section)* (1998) (unpublished manuscript, on file with *The Scholar: St. Mary's Law Review on Minority Issues*) [hereinafter *Idaho Legislature- Introduction Section*]. Actually, only thirty-six states were accounted for in the Idaho study. See *id.* Information was not obtained from Alabama or New Hampshire. See *id.* Alabama allows for contact visitation between death row inmates and their attorneys. See Electronic Mail from Drew Colfax, Death Penalty Attorney at the Equal Justice Initiative in Alabama (Aug. 16, 1999) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (disclosing that contact visits are permissible in Alabama for all death row inmates, including family, friends, and attorneys, and heedless of the status of the appeal); Death Penalty Information Center, *New Hampshire* (visited Feb. 19, 2000) <<http://www.essential.org/dpic/newhampshire.html>> (affirming that as of September 1, 1999, New Hampshire had a death row population of zero).

232. See *Idaho Legislature Introduction Section*, supra note 231.

233. See *id.*

234. See *id.*

235. See *id.*

236. The results from the Idaho research were coupled with personal research and interviews of attorneys that currently engage in death penalty work throughout the country. The effect of this compilation was then combined with the Idaho study to give a more accurate view of the current state of affairs on this issue.

237. See Electronic Mail from Michael Heher, Deputy State Public Defender in Denver, Colorado (Aug. 30, 1999) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

238. See Electronic Mail from Steven Gayle, Death Penalty Attorney in Denver, Colorado (Aug. 24, 1999) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

In South Carolina, the policy is also rigid, but contact visitation is sometimes allowed the day before an execution is to take place.<sup>239</sup> Thus Montana, New York, Kansas, and Texas are the only states in the country that do not allow any contact or private visitation whatsoever. Some of the concerns that arise in Texas death row policy may not be as prevalent in the three other states purely due to the lack of death row inmates in these states. As of September 1, 1999, New York,<sup>240</sup> Montana, and Kansas combined to have a total death row population of twelve.<sup>241</sup> On the other hand, Texas had a death row population of 458.<sup>242</sup> Due to the fact that Texas' death row population is almost forty times greater than the other three states combined, issues of security and inmate control may not be as significant.

Texas finds itself in an extremely small minority when it comes to restrictions on attorney-contact visitation with death row inmates. Additionally, its oppressive system affects more inmates awaiting death than any other state in the Union.<sup>243</sup> If other states can provide for contact, or at least private visits between a death row inmate and his attorney, then the question becomes why will Texas not do so?

The visitation policy currently intact in Texas properly illustrates one facet of a deck that is severely stacked against defense counsel. If an appellate attorney for a death row inmate in Texas cannot attain basic visitation rights, one might question how justice is being served in

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239. See Electronic Mail from John H. Blume, Death Penalty Attorney in Columbia, South Carolina (Aug. 17, 1999) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (mentioning that South Carolina will sometimes allow contact visits the day before the execution, and that inmates receive contact visits in the "death house" before execution).

240. The April 1999 death row population of two for New York is deceiving in that the state has effectively reinstated the death penalty. See Franklin E. Zimring, *The Wages of Ambivalence: On the Context and Prospects of New York's Death Penalty*, 44 *BUFF. L. REV.* 303, 316 (1996). Although the death row population is sure to grow considerably over the next few years, some scholars have argued that due to various reasons, including its geographic location on the East Coast, that an actual execution is still a long way off in New York. See *id.* at 318 (predicting that the first post-1995 execution in New York is still many years away).

241. See Death Penalty Information Center, *Montana* (visited Feb. 19, 2000) <<http://www.essential.org/dpic/montana.html>>; Death Penalty Information Center, *New York* (visited Feb. 19, 2000) <<http://www.essential.org/dpic/newyork.html>>; Death Penalty Information Center, *Kansas* (visited Feb. 19, 2000) <<http://www.essential.org/dpic/kansas.html>>.

242. See Death Penalty Information Center, *Texas* (visited Feb. 19, 2000) <<http://www.essential.org/dpic/texas.html>>.

243. Compare *Number of Executions by State Since 1976*, *supra* note 23 (revealing that the states of Montana, New York, and Kansas have executed a combined total of two inmates since 1976) with Rick Halperin, *supra* note 48.

Texas.<sup>244</sup> Texas, in its state song, prides itself as being the “boldest and grandest” state in the Union.<sup>245</sup> Unfortunately, when it comes to visitation rights for attorneys and their death row clients, Texas seems to be the meekest and most dishonorable.

## V. PROPOSALS

The State of Texas is violating human rights, constitutional rights, and international standards of decency in its implementation of a policy that allows for no contact visits for death row inmates.<sup>246</sup> The contact visitation policy in Texas must change in order to guarantee a more equitable system of capital punishment. Contact visitation should be allowed for family members of death row inmates. The contact visitation should occur until a possible breach of security occurs; at that point severe limitations should be placed on both the inmate and his family member visitor. As part of the new policy, state money should be invested into programs that place family members through increased security measures such as pat down searches before and after the contact visits. In addition, inmates should continue to be required to go through the usual high levels of security control at the prison.

In short, the State of Texas should balance security interests with family values. In exchange, family members should be willing to give up some of their privacy rights in order to gain the privilege of contact visitation with their loved one.

Attorneys should also be given contact visitation with their clients, subject to the same type of security measures that would be imposed on family members. Pat down searches, as well as any other reasonable procedures which strike a balance between the constitutional rights of fairness and security of the prison facility, should be implemented for attorneys visiting death row. Moreover, in the unlikely event that security of the facility is breached by an attorney, contact visitation by that attorney should be ceased by the TDCJ until the state finds the attorney can be trusted enough to proceed with contact visitation.

Texas appears to be overestimating security concerns in its contact visitation policy, and should consider alternative, less-confining means of im-

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244. See Guillermo X. Garcia, *Texas Starts Year at Record Pace of Executions*, USA TODAY, Jan. 21, 2000, at A13 (quoting Stephen Bright, director of the Southern Center for Human Rights in Atlanta, and his belief that the judicial process in death cases in Texas has “the integrity of a professional wrestling match”).

245. See TEXAS ALMANAC, 1998-1999 12 (1998) (referring to the lyrics of the official state song of Texas, *Texas Our Texas*).

246. See generally Interview with Larry Fitzgerald, *supra* note 16 (arguing that the procedure has been effective for the T.D.C.J.).

plementing a more balanced approach to the potential problem of security breaches. In order to combat the state's concerns about security violations, the regulation should be changed in order to stabilize the interests of everyone involved. Specifically, a system should be implemented which allows contact visitation on a regular basis until an improbable security breach takes place. At that point, the inmate and the family member should be reprimanded for their illegal activities. Similar procedures currently exist in other states such as Nebraska.<sup>247</sup> Allowing contact visitation to family members in Texas until a security breach occurs would solve the problem of the state punishing the family before they have committed a wrong. The prison's concerns will also be satisfied, because family members will know that if they are caught attempting to breach the prisons' security, serious consequences will ensue. A possible result of a security breach might be a suspension of all visitation privileges for inmates and their family members. As part of the proposed contact visitation policy, visitors of death row inmates should be obligated to go through reasonable means to secure the safety of other visitors, other prisoners, and prison employees.

The same policy and consequences should be enforced in order to allow for a "last hug" for family members of the condemned. The Texas Department of Criminal Justice falls short of having a sound reason for disallowing a final contact visit for family members in the few hours before execution. Although emotions inevitably run high immediately before execution,<sup>248</sup> Texas should not be concerned with stopping a mother from hugging her son or daughter. If a family member wants to have a brief period of time for physical contact immediately before execution, this compulsion should outweigh any security or other policy concerns that Texas officials may possess. Security issues or concerns dealing with more punishment are far outweighed by a family member attempting to cope emotionally and spiritually with a loved one's execution.<sup>249</sup> If a mother wants to hug her son or daughter one last time, she should be

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247. See Electronic Mail from Paula Hutchinson, Death Penalty Attorney in Nebraska (Aug. 17, 1999) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). (disclosing that even though the written policies for contact visitation are somewhat strict, the actual procedure allows for extensive contact visitation, and there has never been a security violation which might lead prison officials to deviate from the current policy).

248. See Interview with Larry Fitzgerald, *supra* note 116 (perceiving that generally the time leading up to an execution is an emotional and traumatic experience for everyone involved).

249. See MUMIA ABU-JAMAL, *supra* note 118, at 11 (reasoning that the state implements a non-contact visitation policy in order to push families apart, thus making the actual execution of the inmate easier); Interview with Napoleon Beazley, *supra* note 4 (expressing the view that no policy concern can adequately address the need for people to experience physical touch).

given that right. The State of Texas goes beyond distasteful and enters into the realm of heartless behavior when it denies this "last hug."

Texas should allow attorneys to have contact visitation with their clients on death row. There is a violation of constitutional principles when the state goes forth with a non-contact visitation policy that is an exaggerated response to a basic security concern.<sup>250</sup> Specifically, an inmate's civil rights are violated when an inmate is forbidden private contact with his or her attorney.<sup>251</sup> In order to give true "meaningful access to the courts",<sup>252</sup> the implementation of private, contact visits between an inmate and his attorney should be adopted as the law in Texas. Texas may adopt similar procedures, such as pat down searches and metal detectors, in order to insure the security of the prison during the attorney-client visits. It seems unlikely that an attorney would intentionally breach the security of a prison, especially considering it is already against the law to smuggle contraband into a prison. If an unlikely breach happens, though, rigid punishment should be implemented against the attorney. Sanctions or heavy fines may be imposed on an attorney that breaches the security of the prison.

## VI. CONCLUSION

The death penalty has come under an immense amount of criticism from various scholars across the country and around the world. Texas has been at the forefront of practicing capital punishment for various historical and political reasons. In order for the state to have any validity in what it is doing, it should reconsider its policies regarding contact visitation.

Regular contact visitation between an inmate and his or her family should be maintained and encouraged. The Texas Department of Criminal Justice fails to respect family unity when it does not allow a family full contact visitation with their loved one.<sup>253</sup> Further, family members are

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250. See *Mann v. Reynolds*, 46 F.3d 1055, 1060 (10th Cir. 1995) (documenting that *any* possible violation of an inmate's constitutional rights requires that a federal court rely on *Turner* to the extent that they must decide whether the possible violation is reasonably related to justifiable penological objectives or is an exaggerated reply to those concerns).

251. See *Ching v. Lewis*, 895 F.2d 608, 610 (9th Cir. 1990).

252. See *Bounds v. Smith*, 430 U.S. 817, 822 (1977); see also *Ching*, 895 F.2d at 610.

253. See *MUMIA ABU-JAMAL*, *supra* note 118 (expressing the opinion that "the ultimate effect of non-contact visitation is to weaken and eventually sever family ties"). Abu-Jamal goes on to voice the concern that the lack of contact visitation skillfully and deliberately denies a fundamental component and expression of humanity. See *id.* Further, prisoners are as psychologically isolated as they are spatially isolated from their family. See *id.* at 12. Thus, the inmate becomes dead, by state action, to the people that know and love them, and accordingly dead to themselves. See *id.* at 12.

essentially being punished for a crime they did not commit.<sup>254</sup> A no contact visitation policy essentially facilitates the further deterioration of the American family, and dehumanizes the inmate.<sup>255</sup> In Texas the no contact policy may also violate a death row inmate's Due Process rights, considering that other inmates in Texas are afforded procedural due process before losing the right to contact visits.<sup>256</sup>

Texas must consider the ramifications of the institution of an inflexible non-contact visitation policy. State prison officials and legislators must assess the damage it is inflicting when contact visitation is not allowed during legal visits. Texas is quick to place its condemned inmates on the gurney, but does not seem to be as ready to guarantee the effective representation of counsel to those same inmates.

Allowing for private, attorney-client contact visitation is essential in an inmate's appeals process. It is one thing to be in favor of administering capital punishment, but it is something entirely different to ensure that fairness and humanity are inserted into the system. Texas has wholeheartedly adopted the practice of capital punishment, but has failed to create necessary safeguards into the system. This downfall has led to the current mean spirited and discriminatory method of capital punishment now being administered in Texas. If the State of Texas allows contact visitation for family members and attorneys, it may be able to inject some sanity into an insane system.

Death row inmate Napoleon Beazley sums up the current conditions on death row in Texas with a narrative:

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254. See Interview with Napoleon Beazley, *supra* note 4 (indicating that his parents have committed no crimes that require punishment).

255. See MUMIA ABU-JAMAL, *supra* note 118, at 11-12 (concluding that non-contact visitation policies are the state's way of "killing" and inmate before the actual execution takes place). Hence, the physical execution becomes a "fait accompli, a formality already accomplished in spirit, where the state concludes its premeditated drama by putting the 'dead' to death a second time." *Id.*

256. See *Toussaint v. McCarthy*, 801 F.2d 1080, 1099 (9th Cir. 1986) (authenticating the test that must be evaluated in order for prison officials to place an inmate in administrative segregation, and thus treating him or her different from the rest of the prison population). The Court in *Toussaint* ruled that due process merely requires that an inmate be provided with certain notice of the charges facing the inmate and an opportunity for the prisoner to present his or her views to the prison official responsible for deciding the inmates relocation to administrative segregation. See *id.* If this test were to be applied in Texas, it would be clear that the inmate would be successful because prison officials give no specific reasons for why each individual death row inmate is automatically placed in administrative segregation. See also Interview with Larry Fitzgerald, *supra* note 16 (replying simply that security concerns are the reason why death row inmates are automatically placed in administrative segregation and not distinguishing why the policy sweepingly affects all death row inmates).

This is a story about a boy with a rare disease. He had to live his entire life in a sterile plastic bubble, because a single germ or unsterilized touch could be fatal to him. Anyone reaching in the bubble through the hermetically sealed opening had to wear sterilized gloves. Everything that came to him including books, food, utensils, or gifts had to be decontaminated before being passed inside. I mean he was sealed off completely; isolated from his family and in permanent quarantine from the rest of the world. However, not even the airtight sterile could save the boy from death. Once he understood that he was dying, he asked for only one thing. That was to reach outside the protection of his little bubble, and touch his father. Doomed, knowing that this encounter was death itself, the boy reached out and touched his father's hand, making his final moment of death his only moment of life. This boy can serve as a metaphor to every man on death row. No matter what reasons they give for not allowing contact visits, no matter what risks are involved; life is not worth living in a type of sterile bubble that precludes touch. Because that right to touch, or that final moment of touch, even if it hurts, is life itself.<sup>257</sup>

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257. See Letter from Napoleon Beazley, Texas Death Row Inmate #999141 in Huntsville, Tex. (Dec. 13, 1999) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (detailing his opinion about the contact visit policy on Texas' death row).